Trum
Robley

136-657

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 243.

AUGUST TRUM, TRUSTEE OF J. & J. SLEVIN & CO.,
APPELLANT,

vs.

LEANDER J. S. TURNEY AND ROBLEY D. ADAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1886.

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that he is a citizen of the county of Effingham and State of Illinois; that he is the owner in fee *and* sample [simple] of the following lands: The east half of section 36, town. 1 south, range 7 east, of the first principal meridian, in the county of Wayne and State of Illinois, except the southwest ¼ of the southeast ¼ of said section, and we [he] also owned in fee *of* the northwest ¼ of the northwest ¼ of section 6, town. 2 south, range *south* east, in said county and State; that he is now in possession of said lands; that one
4 John Slevin and James Slevin, who are residents of Cincinnati, Ohio, pretend to be the owners of said land under a decree of foreclosure in Clinton county, Illinois, and have a master deed to said land; that said postion [possession] and title is void in law and equity and is a cloud in the title of said complainant; that said title is void as deed under said judicial sale, and that the said deed is void as a color of title; that said deed is prejudicial to the rights of said orator and to his title.

Your orator charges that he make said John and James Slevin, partners, defendants to this bill.

He prays that summons may issue to said defendants, John and James Slevin, commanding them to appear at the March term of the Wayne circuit court, 1875, in the State of Illinois, and that they be ruled to answer this bill (both being waived); that this cause be
refferred to the master in chancery to take testimony; that
5 upon a hearing of this cause your honor will decree that the said pretended deed so held by said defendants be set aside and cancelled and the title of complainant be quieted, and for any and all relief as may seem meet; and, as in duty bound, will ever pray, etc.

LEANDER JAY S. TURNEY,
By B. B. SMITH, *Solicitor.*

(Endorsed:) Filed Oct. 17, 1874. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

2. *Amended Bill.*

STATE OF ILLINOIS, }
County of Wayne. }

Wayne Circuit Court. September Term, A. D. 1875.

To the Honorable T. B. Tanner, judge of the circuit court in and for the county of Wayne and State of Illinois, in chancery sitting:

Humbly complaining, sheweth unto your honor your petitioners, Leander J. S. Turney and Robley D. Adams, both citizens of the State aforesaid, that heretofore, to wit, and this first day of January, A. D. 1855, said petitioners, Leander J. S. Turner, — now the
6 owner in fee simple of the east half of section thirty-six, township one seventh [south], of range seven east, except the southwest quarter of the southeast quarter of section thirty-six, in town. and range aforesaid, and the northwest quarter of the north-

west quarter of section six, township two south, of range eight east, in Wayne county, Illinois.

Your petitioners would further represent that said Leander J. Turney continued to be the lawful and equitable owner of said land until, to wit, on the 15th day of April, A. D. 1874, when petitioners, Leander J. S. Turney, conveyed said lands to your petitioners, Robley D. Adams, who is now the owner of said lands in fee simple and has at this time the custody and possession of the same.

Your petitioners would further represent that said land is worth at this time the sum of, to wit, ten dollars per acre, and is worth in the aggregate the sum of, to wit, three thousand and six hundred dollars.

7 Your petitioners would further represent unto your honor that, to wit, on the 22d day of July, A. D. 1863, James L. Slevin and John Slevin placed upon record books of Wayne county, Illinois, in Book "P" of Deed Records of said county, and on page 327, 328, and 329 thereof, a deed to said lands preporting to convey the said lands to them and preporting to be made by Joseph G. Barkley, special commissioner, appointed by a decree of the circuit court of Clinton county, Illinois, at the August term, A. D. 1860, thereof.

Your petitioners would further — that in the conveyance made by complaintant, Leander J. S. Turney, unto Robley D. Adams and [he] warranteed said lands to be free and clear from all incumbrences.

Your petitioners would further represent that there was no such decree entered in the Clinton circuit court at the August term thereof, 1860, or at any other time, and there never was any power or authority in the said Joseph G. Barkley to convey said land from

8 your petitioners, Leander J. S. Turney, to said John Slevin and James Slevin, and said deed, being without authority of law, is void and is a cloud upon the title of your petitioners, Robley D. Adams, who is the lawful and equitable owner of said lands at this time.

Your petitioners would further represent that said conveyance from said Joseph G. Barkley, as such pretended commissioner, to said John Slevin and James Slevin is such a cloud upon the title of your petitioners that it greatly damages the sale of said land and prevents your petitioners from selling said land, and caused persons who would purchase said land to believe the title to said land is not clear — perfect in your petitioners, and thereby damages and injures your petitioners, Robley D. Adams, who is at this time the lawful and equitable owners of said lands.

Your petitioners would further represent unto your honor that, to wit, on the first day of January, A. D. 1875, the said John Slevin departed this life and left as his only heir and des-endant Thomas

9 E. Slevin, and that whatever interest or right the said John Slevin ever had in said land by virtue of said false and fraudulent deed des-ends to and is now vested in said Thomas E. Slevin.

Your petitioners would further represent that John Slevin and John J. Slevin and August Trum and Anthony Shanter all claim to have an interest in said real estate by virtue of an assignment

and transferred [transfer] to them of the pretended interest of said John Selvin, d'c'd.

Therefore, in tender consideration of the foregoing premises, your petitioners pray that James Slevin, John Slevin, and Thomas Slevin and John J. Slevin and August Trum and Anthony Shanter be made defendants to this petition; that they may be summoned to answer the allegations of this petition, thoug- not under oath, as an answer under oath is hereby expressly waived, and on the final hearing of this cause your honor will decree that that [the] title and interest of your petitioners in said lands be declared free and perfect and clear of all incumbrances denied [derived] through said false, fraudulent, and illegal deed made by said Joseph G. Barkley, commissioner as aforesaid, and that said deed, made and recorded as aforesaid by said Joseph G. Barkley to said John Slevin and James Slevin, be declared nul- and void and a cloud upon the title of your petitioner, Robley D. Adams.

May it please your honor to grant such other and further relief in the premises as to your honor may seeme just; and your petitioners, as in duty bound, will ever pray, etc.

LEANDER J. S. TURNEY,
ROBLEY D. ADAMS,
Petitioners.

R. P. HANNA,
Att'y Comp'ts.

(Endorsed:) Filed Aug. 14, 1876. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

3. *Summons.*

STATE OF ILLINOIS, } ss:
Wayne County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon James Slevin and Thomas Slevin, if they shall be found in your county, personally to be and appear before the circuit court of said Wayne county on the first day of the next term thereof, to be holden at the court-house, in Fairfield, in said Wayne county, on the first Monday of October, 1876, to answer unto L. J. S. Turney and Robley D. Adams in this [their] certain bill of complaint to remove cloud filed in said court, on the chancery side thereof; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John L. Handley, clerk of our said court, and the seal thereof, at Fairfield, this 14th day of August, A. D. 1876.

[SEAL.] JOHN L. HANDLEY, *Clerk.*

12 STATE OF ILLINOIS, } ss:
Wayne County, }

I return this writ not served; the within-named defendants not found in my county.
This Aug. 14, 1876.

M. E. BOZARTH, *Sheriff.*

(Endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

13 4. *Affidavit of Non-Residence.*

Affidavit of non-residents of James & Thomas Slevin.

STATE OF ILLINOIS, } ss:
Wayne County, }

R. P. Hanna, being duly sworn, upon his oath says that the residence of James and Thomas Slevin, upon diligent inquiry, cannot be ascertained, and he is informed and verily believes that James and Thomas Slevin are non-residents of this State, and that their post-office address is unknown to him.

R. P. HANNA.

Subscribed & sworn to before me this Aug. 15th, 1876.
[SEAL.] R. D. ADAMS, *N. P.*

(Endorsed:) Filed Aug. 15, 1876. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

14 5. *Certificate of Publication of Non-Residents.*

I, R. F. Brown, editor & proprietor of the Fairfield Democrat, a weekly newspaper printed & published in the town of Fairfield, Wayne county, Illinois, certify that the attached notice was published for six consecutive weeks in said paper. The first insertion was made on the 17th day of August, 1876.

R. F. BROWN,
Editor & Publisher.

October 10th, 1876.

15 *Notice.*

Non-residence notice.

STATE OF ILLINOIS, } ss:
Wayne County, }

In the Circuit Court. Oct. Term, 1876.

L. J. S. TURNEY *et al.*
vs.
JAMES SLEVIN, THOMAS SLEVIN. } To Remove Cloud.

Affidavit of the non-residence of James Slevin and Thomas

Slevin, the above-named defendant-, having been filed in the clerk's office of the circuit court, notice is therefore hereby given to said James Slevin and Thomas Slevin that the complainants filed their bill of complaint in said court, on the chancery side thereof, on the 14th day of August, 1876, and that thereupon a summons issued out of said court, returnable on first Monday in the month of October next, as is by law required.

Now, unless you, the said James Slevin and Thomas Slevin, shall personally be and appear before the court on the first day of
16 the next term thereof, to be holden in and for the said county, on the first Monday in October next, and plead, answer, or demure to the said complainants' bill of complaint, the same and the matters and things therein charged and stated will be taken as confessed and a decree entered against you according to the prayer of said bill.

JOHN L. HANDLEY, *Clerk.*

Fairfield, Illinois, August 15th, 1876.

R. P. HANNA,
Compl'ts' Sol.

(Endorsed:) Filed Oct. 12, 1876. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

6. *Answer.*

STATE OF ILLINOIS, } ss:
Wayne County, }

Wayne Circuit Court. October Term, 1876.

LEANDER J. S. TURNEY and ROBLEY D. ADAMS } To Remove Cloud.
vs.
JOHN SLEVIN and THOMAS E. SLEVIN and Others. }

The answer of John Slevin and Thomas E. Slevin and John F. Slevin, August Trum, and Anthony Shouter to the bill of
17 complain*ant* filed hereing against them by Turney and Adams, complainants.

These respondents, saving and reserving to themselves all and all manner of benefit or advantage that can or may be taken to the many errors or imperfection- in said bill contained, for answer thereunto or so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say—

That true it is that on the first day of January, A. D. 1853, L. J. S. Turney was the owner in fee simple of the lands in said bill contained, but that on the 21st day of November, 1853, he executed to J. and J. Slevin, of Cincinnati, Ohio, this mortgag*ag* deed to said lands for a good and valuable consideration, to wit, the sum of two thousand dollars, which mortgage was duly recorded in the recorder's office of Wayne county, Illinois, in Book A, on page 5, of Mortgage Records.

That afterwards, to wit, on the 10th day of December, 1857,
18 said lands were sold by Joseph G. Barkley, master in chancery of Wayne county, Illinois, by virtue of a decree of foreclosure had in the Clinton county circuit court, in the State of Illinois, on a change of the venue from the Wayne county circuit court, State of Illinois, rendered at the May term, 1856, at which sale Charles A. Beecher became the purchaser of said lands, to whom a certificate of purchase was issued, upon which certificate of perchase afterward, to wit, on the 21st day of July, A. D. 1863, a deed was executed to J. and J. Slevin as the assignees of said C. A. Beecher, which deed was made and executed by J. G. Barkley, master in chancery of Wayne county, Illinois, which deed is recorded in Book P, on page 330.

And defendants further answer and say that they claim title under the foreclosure of a certain mortgage executed on the 6th day of September, 1851, by said Turny and wife and Charles A. Eldridge,
and also under the foreclosure of a certain other mortgage
19 executed July 30, 1853, by said Turny to Edwin Beecher, both of which mortgages included the said land in said bill described, and were foreclosed at the same time and in the same court as the mortgage first above decided [described] to J. and J. Slevin and Charles A. Beecher, because they purchased under the foreclosure of said three mortgages, who assigned his certificate of purchase to J. and J. Slevin, as above stated, and that said J. and J. Slevin and their grantees and heirs and legal representations [representatives] has [have] been in continues [continuous] prossecution of said courts under said deed for more than seven years, since July 21st, 1863.

Defendants further answer that heretofore, to wit, on the 10th day of June, A. D. 1862, the sheriff of Wayne county, Illinois, executed and paid taxes to John Slevin — a deed to the lands menti-ned in complainants' bill and a certificat- of purchase held by said John Slevin for the taxes, interest, and costs on said lands due thereon for the year 1859, which deed is recorded in Book N, on page 542.

20 Defendants deny that their deeds are a cloud upon the title of the complainants, but that in truth and in fact they are the legal and equitable owners of the land in said bill of complaint mentioned, and that they have been and are now in the constructive possession of the same, and have paid all taxes assessed thereon since the year 1859.

Defendants deny that either of said complainants have any interest whatever in and to said lands.

Defendants deny that the complainant, Leander J. S. Turney, was the owner of said lands up to April 15th, 1875, and they further deny that Robley D. Adams has the custody of or is in possession of said lands, but that in truth and in fact the said Adams took a decree to said lands with the full knowledge of the rights of these defendants and in the face of their undisputed and open possession,
and that he paid no consideration whatever for said lands.

21 Defendants deny each and every material allegation in said bill contained except as herein admitted; and now, hav-

ing fully answered the same, they ask to be discharged with their reasonable charges and costs therein expended.

JOHN SLEVIN,
THOMAS E. SLEVIN,
JOHN T. SLEVIN,
AUGUST TRUM, AND
ANTHONY SHANTER,
By G. J. GEORGE,
Att'y for Def'ts, and
WM. J. CONKLING,
Att'y for Def'ts.

(Endorsed:) Filed Oct. 12th, 1876. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

7. *Bond for Removal of Cause to U. S. Court.*

Know all men by their [these] presents that Mr. Robley D. Adams — R. P. Hanna are held and firmly bound unto Thomas E. Slevin and James Slevin in the penal sum of five hundred dollars, to be paid, if default be made in the following conditions, to wit:

Witness are land [our hands] and seal- this 12th day of October, A. D. 1876.

22 The conditions of the above obligations is [are] such — whereas the said Leander J. S. Turney and Robley D. Adams have filed their petitions in a case now pending in the circuit court of Wayne county, wherein Leander J. S. Turney and Robley D. Adams are complainants and Thomas E. Slevin and James Slevin are defendants, to cer-ify and transmit said cause to the circuit court of the United States for the southern district of Illinois: Now, if the said complain-ts will procure a full and compleet- transcript of the records and proceedings of said cause, and have the same property certified and transmitted to the clerk of said United States court by the first day of the next term of said United States circuit court in said southern district of Illinois, and enter the appe-rance of said complain-ts in said county, and pray [pay] all the cost herein occasioned by the transmitting of said record to the United States court aforesaid in case said court should have no jurisdiction of this cause, then this bond to be void; otherwise to remain in full force and effect.

23 Witness and [our] hand- — seal- the day and year above written.

R. P. HANNA. [SEAL.]
R. D. ADAMS. [SEAL.]

(Endorsed:) Filed Oct. 14, 1876. John L. Hendley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

S. *Petition to Remove Cause to U. S. Court.*

STATE OF ILLINOIS, }
County of Wayne. }

Wayne Cir. Court. Oct. Term, 1876.

LEANDER J. S. TURNEY at [*et*] *al.* }
vs. } Chancery.
JAMES and THOS. E. SLEVIN. }

The complainants herein present this the petition to this hon. court, and respectfully represent unto your honor that both *a* and all the respondants in this cause are non-residents of the State of Illinois and are residents of the State of Ohio, and that both and all the complainants herein are residents of the State of Illinois, and each and all of said parties in this cause were so residents of said States, respectively, at the time of the commencement of this cause.

Complainants would also respectfully show unto your honor that the amount in controversy in this cause, excluding [exclu-
24 sive] of costs, exceed- the sum of $500 and is, to wit, of the value of five thousand dollars; that the matter in controversy consists of the lands in complainants' bill described, which are fully of the value of five thousand dollars, as above set forth.

Petitioners further show that they hereby tender to the court a good and sufficient bond, conditioned as the laws of the Congress of the United States requires in such cases, with Robert P. Hanna as *s*h*ur*i*t*y, that they will procure and file in the circuit court of the United States for the southern district of Illinois, at Springfield, by the first day of the next term of said court, the records in this cause and enter the appearance in said court of the said complainants herein.

Complainants represent that this petition is filed for the purpose of transmitting this cause to the circuit court of the United States for southern district of Illinois, made in persuance of and by virtue of an act of Congress of the United States, which they accordingly pray may be done, etc.

25 L. J. S. TURNEY,
R. D. ADAMS,
By R. P. HANNA,
Att'y Comp't-.

STATE OF ILLINOIS, }
County of Wayne. }

R. P. Hanna, after being first duly sworn, on his oath says that the matters and things set forth in this the foregoing petition are true so far as he states them from his own knowledge, and so far as he states them from the knowledge and information of others he believes them to be true, and that this affiant is the att'y and ag't of R. D. Adams and of the compla-n-ts in this cause.

R. P. HANNA.

Subscribed and sworn to before me this 13th Oct., 1876.
JOHN L. HANDLEY, *Clerk.*

(Endorsed:) Filed Oct. 14, 1876. John L. Handley, clerk.
(Also endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

26 9. *Transcript of Proceedings of Court.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Wayne County, }

In Circuit Court. March Term, A. D. 1876.

Please before the Honorable Tazewell B. Tanner, judge of the twenty-fourth judicial circuit of the State of Illinois and sole presiding judge of the circuit court of Wayne county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the town of Fairfield, in said county, on the thirteenth, 13th, day, being the second day of March, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth and first.

Present: Honorable Tazwell B. Tanner, judge of the 24th judicial circuit of the State of Illinois; C. C. Boggs, State's attorney; Martin E. Bozartt, sheriff.

Attest: JOHN L. HANDLEY, *Clerk.*

27 LEANDER J. S. TURNEY }
vs.
JAMES SLEVIN and THOMAS SLEVIN. }

And now, at this third day, on motion, leave is hereby given to amend the bill filed herein by making new parties to this cause, and this cause is continued.

And afterward, at the October term, A. D. 1876, of said court—present, the same as above—the following further order was made in said cause, to wit:

LEANDER JAY S. TURNEY *et al.* }
vs.
JAMES SLEVIN and THOMAS SLEVIN. }

And now, on this thirteenth day, come the said com-lainants and files his petition and tenders his bond and entered a motion to have the venue in this cause changed to the circuit court of the United States for the southern district of Illinois.

And the court adjudging the petition filed herein for change
28 of venue sufficient and approving the bond filed by the complainants herein, it is therefore ordered that the venue in this cause be changed to the circuit court of the United States for the southern district of Illinois, and that the clerk of this court make

out and transmit to the clerk of the circuit court of the United States for the southern district of Illinois a full and complete record in this cause, together with all the original papers herein properly authenticated and certified, and that the complainant- herein pay the cost of such transcript.

STATE OF ILLINOIS, } ss:
Wayne County, }

I, Rob't E. Mabry, clerk of the circuit court in and for the said county and State, do hereby certify that the above and foregoing is a true, perfect, and complete copy of the judgement rendered
29 by the circuit court of said Wayne county at the October term, A. D. 1875, in a certain cause therein pending, wherein Leander J. S. Turney and Robley D. Adams were complainants and James Slevin and Thomas Slevin defendants, and that the papers transmitted herewith, marked, respectfully [respectively], A, B, C, D, E, F, G, and H, are all the original papers in said cause.

Witness Robert E. Mabry, clerk of our said court, and the
[SEAL.] seal thereof, at Fairfield, in said Wayne county, this 27th day of December, A. D. 1876.

ROBERT E. MABRY, *Clerk.*

(Endorsed:) Filed January 2, 1877. J. A. Jones, clerk.

30 And afterwards, to wit, on the 2d day of March, in the year last aforesaid (A. D. 1877), came the parties, by their solicitors, and filed in the clerk's office of said circuit court of the United States for the southern district of Illinois their stipulation in said cause; and also came the defendants, by their solicitors, and filed their cross-bill and exhibits thereto; which said stipulation and cross-bill, with exhibits, are in the words and figures following to wit:

Stipulation.

STATE OF ILLINOIS, } ss:
Wayne County, }

Wayne Circuit Court. September Term, A. D. 1876.

LEANDER JAY S. TURNEY *vs.* JAMES SLEVIN & THOMAS SLEVIN.	Chancery. Bill to Remove Cloud, &c.
L. JAY S. TURNEY *et al.* *vs.* JAMES and THOMAS SLEVIN.	Amended Bill, &c., to September Term, A. D. 1876.

Upon application of complainants, above-entitled cause
31 was, by order of Wayne circuit court, transferred to the circuit court of the United States for the southern district of Illinois, in which the papers are filed January 2d, 1887.

Stipulation.

It is hereby mutually stipulated by and between the parties, complainants and respondent-, in above-entitled cause that said cause be permitted to remain upon the docket of the circuit court of the U. S. for said district for trial or disposition, as the case m-y be, the right to strike the said cause from said docket by reason of not being filed in said circuit court of the U. S. in the time limited by act of Congress of March 3, 1875, presiding for the transfer of causes from State to Federal court, being hereby wa-ved by said respondents; in consideration whereof the said complainants hereby consent and agree that the said respondents may, without prejudice or any manner of exception, file in the said circuit court of the U. S. for said district of Illinois their cross-bill instead of in the circuit
32 court of Wayne county, Illinois, in which the land lies which constitutes the subject-matter of the above cause of action, or in the circuit court of Clinton county, Illinois, to which a change of venure was orriginally taken by said complainants, as respondent- (or either of them), in a bill or bills wherein said Slevin, one Charles W. Eldridge, and one Edwin Beecher are complainants, in their seperate chancery suits or foreclosure, and as are specified in the master'- deed to said Slevins, to whom said deed was made, and to remove which as a cloud on their title this suit is brought by said Turney *et al.*

It is hereby further stipulated that in the proceeding under said cross-bill any ommission in the records of Wayne or Clinton county in said causes that were pending therein may be rectified in said district court of the U. S. in the same manner and with the same — as if a petition had been filed for that purpose in either of said counties, as by the statutes of Illinois in such case made and provided.

33 It is further agreed that the respondent- will enter the appearance of any other parties who may by assignment or otherwise have any interest in said land, and the complainants reserve the privaledge to expressly deny all allegation of them having any deed are [or] having held either in Wayne or Clinton county.

R. P. HANNA, *Att'y Comp't-.*
CONKLING AND GEORGE,
Att'ys and Sol'rs for Respondents.

(Endorsed:) Filed March 2, 1877. J. A. Jones, clerk.

34 *Cross-Bill.*

STATE OF ILLINOIS, } ss:
Wayne County, }

Wayne Circuit Court. September Term, 1876.

LEANDER J. S. TURNEY
vs.
JAMES SLEVIN & THOMAS SLEVIN. } Chancery. Bill to Remove Cloud, etc.

L. J. S. TURNEY *et al.*
vs.
JAMES & THOMAS SLEVIN. } Same. Amend Bill, etc., to September Term, A. D. 1876.

Transfer-ed by complainants from the circuit court of Wayne county, Illinois, to the circuit court of the United States for the southern district of Illinois, and to the January term thereof, A. D. 1877.

UNITED STATES OF AMERICA, }
Southern District of Illinois. }

Of the January Term, A. D. 1877.

JOHN SLEVIN, THOMAS E. SLEVIN, and James S. Slevin, and John F. Slevin, August Trum, & Anthony Shouter, Trustees of J. and J. Slevin & Co.,
vs.
LEANDER J. S. TURNEY & ROBLEY D. ADAMS. } In Chancery. Cross-Bill to Remove Cloud & Establish Title.

35 To the judges of the circuit court of the United States for the southern district of Illinois:

Thomas E. Slevin, — the city of New York, and a citizen of the State of New York; John Slevin and James S. Slevin, — Cincinnati, and citizens of the State of Ohio; John F. Slevin, of St. Louis, and a citizen of the State of Missouri; August Trum, of Cincinnati, Ohio, and a citizen of the State of Ohio, and Anthony Shouter, of Mt. Airy, and a citizen of the State of Ohio, bring this their cross-bill against Leander J. S. Turney and Robley D. Adams, of Fairfield, Wayne county, Illinois, and citizens of the State of Illinois, and of the southern district thereof.

And thereupon your orators complain and say that heretofore, to wit, on the 6th day of September, 1851, the said Leander J. S. Turney and Elizabeth Turney, his wife, made, executed, and delivered to Charles W. Eldridge their deed of mortgage upon the east half of section thirty-six, in township one south, of range seven east, situated in Wayne county, Illinois, to secure the payment of a certain

promis-ory note executed on the said 6th day of September by
36 the said Leander J. S. Turney to the said Charles W. Eldridge for the sum of nine hundred dollars, with interest thereon from the date of said note, which note was given for the purchase-money of said lands, and that said mortgage was duly recorded in the proper office in Wayne county, Illinois.

That afterwards, to wit, on the 6th day of February, 1856, the said Charles W. Eldridge filed in the circuit court for the said county, Illinois, his bill in chancery to foreclose said mortgage and sell said real estate to pay the aforesaid note mentioned *mentioned* in the aforesaid mortgage, making the said Leander J. S. Turney and Elizabeth Turney, his wife, and other- respond*ants*; and on the said 16th day of February, 1856 a subpœna in chancery was issued by the clerk of the said circuit court of Wayne county, Illinois, in said cause, directed to the sheriff of said Wayne county to execute, and commanding him to summon the said Leander J. S. Turney and Elizabeth Turney, his wife, and others to be and appear before the said circuit court of Wayne county, Illinois, on the first day of March term thereof, to answer the said bill of complainant-;
37 which said subpœna was duly served upon said Leander J. S. Turney and Elizabeth Turney, his wife.

That afterwards, to wit, at the April term, 1856, of the said circuit court of Wayne county, Illinois, upon the application of the said Leander J. S. Turney, the venue in said cause was changed to the circuit court of Clinton county, Illinois.

That afterwards, to wit, at the May term, 1856, of the said circuit court of Clinton county, Illinois, the said Leander J. S. Turney answered said bill of complainants, in which answer it was alleged, among other things, that the said Leander J. S. Turney, on the 30th day of July, 1853, mortgaged the said east half of section 36, T. 1 S., R. 7 E., to one Edwin Beecher, and that the said E. ½ 36, T. 1 S., R. 7 E., was, on the 2d November, 1853, mortgaged by the said Turney to John and James Slevin, of Cincinnati, Ohio, and Philadelphia, Penn., respectively; which said answer was filed in the clerk's office of the said circuit court of Clinton county, Illinois, on the 25th May, 1856.

That such proceedings one [were] had in said cause, of [at]
38 the said May term, 1856, of said circuit court of Clinton county, that the Hon. Sidney Breese, judge then presiding, entered upon this docket the following minutes, to wit:

"Hognie enters appearance of L. J. S. Turney, defendant to bill, and confesses to matters and things therein contained.

"Leave to amend bill by motion of Edwin Beecher, d'f't. Mr. Hognie enters appearance of E. Beecher and confesses the allegation as to him. Leave to defendant to answer said amended bill by 12 m."

That afterwards, to wit, on the 10th day of January, 1857, Joseph G. Barkley, as master in chancery *as master in chancery*, of the county of Wayne, Illinois, acting under and by virtue of the aforesaid *a* decree of the said Clinton circuit court, and after having made advertisement as in said decree required and in compliance thereof, at

the door of the court-house, in Fairfield, Wayne county, Illinois, sold the said E. ½ sec. 36, &c., as the property of the said Turney to satisfy said mortgage in favor of the said Charles W. Eldridge and the decree rendered in pursuance of the foreclosure thereof and as
39 answering to the statute in such cases made and provided, and at said sale Charles A. Beecher became the purchaser of said premises and received a certificate of purchase therefor.

Your orators further complain and say that heretofore, to wit, on the 30th day of July, 1853, the said Leander J. S. Turney made, executed, and delivered to Edwin Beecher, of Fairfield, Illinois, a deed of mortgage upon the said east half of section thirty-six, in township one south, range seven east, situated in Wayne county, Illinois, also out-lot number seven, in Turney's Second Addition to the town of Fairfield, in said county of Wayne, to secure the payment of a certain promis-ory note executed on the said 30th day of July, 1853, by the said Turney to the said Beecher for the sum of three hundred and thirty-seven dollars, payable on or before the first day of March, 1854, with interest, at the rate of ten per cent. per annum, from date till paid.

That afterwards, to wit, on the 27th day of November, 1855, the said Edwin Beecher, for the case of James Slevin (now decreed [deceased]), and John Slevin aforesaid, filed in the circuit court for the said
40 county of Wayne, Illinois, his bill in chancery to foreclose said mortgage and sell said real estate therein mentioned to pay the aforesaid note mentioned in the last aforesaid mortgage, and making the said Leander J. S. Turney respondant; that a subpo*nie* in chancery was issued by the clerk of the said circuit court of Wayne county, Illinois, in said cause, directed to the sheriff of said Wayne county to execute, and commanding him to summon the said Leander J. S. Turney, and perhaps others, to be and appear before the said circuit court of Wayne county on a day therein named to answer the said bill of complainant; which said subpœna was duly served upon said Leander J. S. Turney.

That afterwards, to wit, at the April term, 1856, of the said circuit court of Wayne county, Illinois, upon the application of the said Turney, the venue in said cause last mentioned was changed to the circuit court of Clinton county, Illinois.

That afterwards, to wit, at the May term, 1856, of the said circuit court of Clinton county, Illinois, the said Turney filed his answer to said last-mentioned bill of complaint, in which answer it was
41 alleged, among other things, that a part of the land, to wit, the east half of section thirty-six, had been before the date of said mortgage to said Edwin Beecher conveyed by the said Leander J. S. Turney and Elizabeth, his wife, to Charles W. Eldridge by mortgage; that such proceedings are [were] had in said last-mentioned cause, at the said May term, 1856, of said circuit court of Clinton county, that the Hon. Sidney Breese, judge then pending [presiding], entered upon his docket the following minutes, to wit:

"Wed.—Rule to answer bill by Friday. Reference to master to complete [compute] principal and interest.

" Master reports of principal due	$308 89
" Interest	58 75
	$367 64

" Decree of foreclosure and sale by master in chancery of Wayne county, after six weeks' notice in some public*k* newspaper nearest the premises and posting up written or printed notices of the time, place, and *term* terms in four of the most public places in the county; sale to be at the court-house door, for cash."

That, to wit, on the 10th day of January, 1857, Joseph G. Barkley, as master in chancery of the Wayne county circuit
42 court, Illinois, acting under and by virtue of the aforesaid as a decree of the said Clinton circuit court, Illinois, and after having made advertis-ment as in said decree required and in compliance thereof, at the door of the court-house, in Fairfield, Wayne county, Illinois, sold the said E. ½ sec. 36, &c., and the out-lot No. 7, in Turney's Second Addition to the town of Fairfield, Wayne county, Illinois, as the property of the said Turney, to satisfy the said mortgage in favor of said E. Beecher and the decree last aforesaid, rendered in pursuance of the foreclosure thereof and in accordance with the statute in such case made and provided, and at said sale Charles A. Beecher — the purchaser of said premises and received a certificate of purchase therefor.

Your orators further complain and say that heretofore, to wit, on the 21st day of November, 1853, the said L. Jay S. Turney made, executed, and delivered to James Slevin and John Slevin, partners trading under the style of J. and J. Slevin, of Cincinnati, Ohio, a deed of mortgage upon the said east half of section thirty-six,
43 in township one south, range seven east, and the northwest quarter of the northwest quarter of section six, in township two south, range eight east, situated in Wayne county, Illinois, to secure the payment of a certain premissory note executed on the said 21st November, 1853, by the said Turney to the said J. and J. Slevin, for the sum of two thousand dollars, payable t-o years after date thereof.

That afterwards, to wit, on the 26th November, 1855, the said James Slevin and John Slevin filed in the circuit court of Wayne county, Illinois, their bill in chancery to foreclose said last-mentioned mortgage and sell the real estate therein mentioned to pay the aforesaid note and making the said Turney defendant.

That a subpœn*ie* in chancery was served by the clerk of the said circuit court of Wayne county, Illinois, in said cause, and directed to the sheriff of said Wayne county to execute, and commanding him to summons the said Turney and others to be and appear before the circuit court of Wayne county, Illinois, on a day therein named to answer the said bill of complainant-; which said subpœn*ie* was duly served on said Turney.

44 That afterward, to wit, at the April term, 1856, of said circuit court of Wayne county, Illinois, upon the application of

said Turney the venue in said cause last mentioned was changed to the circuit court of Clinton county, Illinois.

That afterwards, to wit, at the May term, 1856, of the said circuit court of Clinton county, and on the 23d day of said month of May, 1856, the said Turney filed his answer to said last-mentioned bill of complaint, in which answer it was alleged, among other things, and the said Turney showed to the court the fact of the execution and existance of the said mortgage to the aforesaid Charles W. Eldridge and of the said mortgage to the aforesaid Edwin Beecher.

That such proceedings are [were] had in said last-mentioned cause, at the said May term, 1856, of said circuit court of Clinton county, that the Hon. Sidney Breese, judge then presiding, entered upon his docket the following minutes, v's [viz]:

"Rule to answer by Friday M. Same order. Answer to bill. Decree. Reference to master to complete [compute] principal and int'r. due.

"Master reports of principal due	$2,000 00
" " " " "	60 00
	$2,060 00

45 "Decree of foreclosure and sale by master in chancery of Wayne county, at the court-house door, after six weeks' notice in newspaper and posting up notices in four of the most public places in the county of the time, terms, and place of sale, for cash."

That afterwards, to wit, on the 10th January, 1857, Joseph G. Barkley, as master in chancery of said county of Wayne, Illinois, acting under and by virtue of the aforesaid decree of the said Clinton — court, after having made advertis-ment in said decree refered [required] and in compliance thereof, at the door of the court-house, in Fairfield, Wayne county, Illinois, sold the said E. ½ sec. 36, &c., and the said N. W. ¼ N. W. ¼ sec. 6, etc., as the property of the said Turney, to satisfy the said mortgage in favor of the said J. and J. Slevin and the decree of foreclosure last aforesaid, renewed [rendered] in persuance thereof and according to the statute in said cause made and provided, as well as said decree; and at said sale said Charles A. Beecher became the purchaser of said mortgage-premises and secured a certificate of purchase therefor.

That said mentioned several certificates of purchase issued
46 by the aforesaid Joseph G. Barkley, as said master in chancery of Wayne county, on the said 10 January, 1857, at the then aforementioned sales and under and by virtue of the aforesaid decree rendered in the aforementioned cause of said Charles W. Eldridge, Edwin Beecher, and J. and J. Slevin to the said Charles A. Beecher, were by the said Charles A. Beecher duly assigned — sworn after the said 10 January, 1857, to the said James and John Slevin, who thereby became entitled, in case said premises described in all three of the aforesaid mortgages and causes of action to foreclose the same are not redeemed according to law, to a deed or deeds for the said mortgaged premises, and that it is true

that the said Joseph G. Barkley, as said master in chancery as aforesaid, deed [did] make, execute, and deliver deed or deeds to the said J. and J. Slevin upon the aforesaid certificate- of purchase, the said premises not having been redeemed from said sales by the said Turney.

That afterwards, to wit, at the special June term, 1858, of the said Clinton circuit court, upon the said Barkley, as master in chancery aforesaid, presenting his report of sale in the above-mentioned
47 cases in the said Clinton circuit court for approval by the said court, the said Turney entered his motion to set aside the said sales for the reason that the said sales are irregular in that — a decree of the court and in derogation of the right of said Turney, and that the said Turney as complainant filed his bill in said Clinton circuit court making the said John Slevin, James Slevin, Charles A. Beecher, and the said Joseph G. Barkley parties respondants thereto, and in said bill setting out in full all the foregoing facts stated in this your orators' cross-bill, and asking that the said Joseph G. Barkley be restrained from making deed or deeds for said premises or any part thereof *and in deed* by force of said sale, made as aforesaid, until the further order of the court in the premises, and provi-ing such further relief as the nature of his case and equity and good conscience shall require, etc., as will be made to appear on the final hearing of this cause.

That afterwards, to wit, at the August term, 1860, of the said Clinton circuit court, upon the final hearing by the said court of the last aforesaid application by the said Turney, by the consent
48 of all the parties, all the foregoing sales are set aside by the said court and a resale of all the aforesaid mortgaged premises in the said three mortgages described, as well as in the respe-tive bills to foreclose the same, ordered and decreed by the said court to be made by the said Barkley, master in chancery as aforesaid, and that there are also full and formal decrees prepared in each of the aforesaid mentioned suits in foreclosure of the said May term, 1856, as well as the supplimental decree and order of the said August term, 1860, in all of said causes and presented to the said court for approval, and the same and [were] all approve- by the court at said August term, 1860, as all of which will more fully appear in the deeds of said Joseph G. Barkley, as master as aforesaid, to the said J. and J. Slevin, which will be refer-ed to and — in evidence in the hearing hereof, from which it will appear that the said mortgages are duly foreclosed by said mortgages as aforesaid according to law and according to all the formalities of preceedings in chancery in such causes; that all the rights of said Turney in said matters are fully protected by the court, and that all
49 right, title, and interest of said Turney in said mortgage-premises passed by the aforesaid deeds of the said Barkley, as master in chancery as aforesaid, from said Turney to the said James and John Slevin, as said grantees, by virtue of the assignment to them of the certificate of purchase by said Charles A. Beecher, the purchaser of said mortgaged premises at the second sale which was ordered, and in and by virtue of said supplimental

decree of said August term, 1860, of said Clinton circuit court, and they became the owners in fee simple of the said mortgaged premises, which are fully set out and described in your orators' deeds aforesaid, which will be filed herein and marked Exhibit- "A" and "B."

That in the year 1864 the name and style of said law firm of J. and J. Slevin was changed to that of J. and J. Slevin and Sons.

That afterwards, to wit, on the 18 day of April, 1872, the said James Slevin departed this life testate, making the said Thomas E. Slevin, one of the complainants in this cross-bill, his sole devisee, who thereby became the owner of all the title and interest of the said James Slevin in and to the said mortgaged premises, and that after the death of the said James Slevin, or in the year 1872, the firm now of the said J. and J. Slevin and Sons was changed to the firm name and style of J. and J. Slevin and Co.

That afterwards, to wit, on the 25th day of March, 1876, in the district court of the United States for the southern district of Ohio, No. 1711, the said J. and J. Slevin and Co. filed their proposition for composition and effected the same, which was confirmed by the court April 10, 1876, in a cause in the nature of bankruptcy, and that afterwards they are adjudged and decreed bankrupts, as will the more fully appear by reference to a certified copy of the order of the said court in that behalf by the clerk there*by*, here*by*with filed and marked Exhibit "C" and made part of this cross-bill, from which it will appear that the said John F. Slevin, August Trum, and Anthony Shouter, also complainants in this their cross-bill, are duly appointed trustees of the said J. and J. Slevin and Co., to whom by deed of the said J. and J. Slevin and Co. the said mortgaged premises have heretofore been
51 conveyed, and who holds the title to the same.

Your orators would further respectfully represent unto your honor that they have had possession of the aforesaid mortgaged premises ever since they acquired title thereto as aforesaid, and are now entitled to the possession thereof under and by virtue of their said title*d* acquired as aforesaid through the deed foreclosure of the aforesaid respective mortgage and the decree of the said circuit court rendered in aforesaid causes of action at said August term, 1860, thereof and the said sale of said master in chancery thereunder.

That at the time the said Turney filed his bill to remove the title of your orator- or a cloud upon his title your orator- alleged that the said Turney had no title whatever to the said premises in his said bill and in this cross-bill specified, how [nor] at any time thereafter, and that his said deed of conveyance of said premises to the said Robley D. Adams, who has filed his bill as an amended bill in connection with said Turney in said cause of action in which
52 this cross-bill is filed, in pursuance of the written stipulation of the parties in this cross-bill and said original bill, now filed herein, was found upon your orator-, who alleged that the said Robley D. Adams well k-ew that said Turney, his grantee, had no title whatever in and to said mortgaged premises, and that he was

receiving no title thereby, but intended by so doing to put upon record said deed and thereby cloud the title of your orators with a view to extract money from them, your orators, and compel them to buy the said false and fraudulent as well as trumpt-up title, for which the said Robley D. Adams paid no consideration whatever; that the said Adams had full notice of the existance of your orators' title in and to said lands, or [as] the same was a matter of public record in said Wayne county, Illinois, since the 22nd July, 1863, some eleven years prior to the date of his said fraudulent and trumpt-up title or deed from said Turney, who had no title in and to said premises, as both said Adams and Turney well know, and also about two years after the said Turney had filed his bill
53 to remove your orators' title as a cloud upon his own title to said land.

Your orators allege that the original decrees above specified in said three cases have been stolen, lost, or distroyed and were never recorded among the records of Clinton or Wayne counties, as they should have been; that diligent search has been made for them for a number of years past by attorneys and others interested in said cases, and they could never be found; that, however, the deeds by said master in chancery, and executed to said J. and J. Slevin prior to the said decree, having disappeared, as stated above—

Your orators would further represent that they filed this their cross-bill in this case, among other things, to complete and perfect their title to the aforesaid real estate which has been so lost or destroyed, as well as to remove any cloud thereupon so manufactured as aforesaid through said Adams and Turney — connivance and fraud and as authorized by the statutes of the State of Illinois in such cases made and provided and as stipulated by and in the stipulation aforesaid filed in this case.

54 In tender consideration of the premises, and inasmuch as your orators are without remedy save in a court of chancery, your orators pray that the said Leander J. S. Turney and the said Robley D. Adams be made respondants herein, and that they be required to full answer make to the charge and allegation herein contained (their answer under oath being hereby waived), and that upon a final hearing of this cause that it would please your honor that a decree may be rendered decreeing that such decree as may be proved to have been firmly [finally] rendered in all of the said three causes may be spread upon the records of this court, and that said decree shall be considered as fully established, having [leaving] the title of said complainants in this cross-bill to the lands in controversy as would be if said original decree had been duly recorded in the proper court prior to their said loss, and that whatever title may have existed in said Turney or his grantees should be answered by this court as having been extinguished by said decree, which should have been spread upon the records of
55 said three causes when pending in the said circuit court of said county of Clinton, Illinois, and that — such other and fur-

ther *rectify* [relief] as the notice [nature] of the case and equity may require; and as in duty bound your orators will ever pray, etc.

CONKLING & GEORGE,
Solicitors for Complainant- in Cross-Bill.

STATE OF OHIO, }
Hamilton County, } *ss:*

This affiant, being first duly sworn, deposeth and saith that he is one of the complainants in the above cross-bill, and that he is one of the original mortgagers in one of the mortgages specified in above cross-bill executed by said Leander J. S. Turney to J. and J. Slevin, and also in the deeds specified in above cross-bill; that said mortgage was foreclosed in the circuit court of Clinton count-, Illinois; that the original decree of foreclosure in said causes have [has] been stolen, lost, or destroyed, and that certified copys thereof cannot be had or obtained by this affiant; that said decree as rendered in said causes are [is] set out fully in his deeds marked Exhibit- "A" and "B," refer-ed to in above cross-bill, and to which affiant now
56 refers for a statement of the said deeds, and that such loses [loss] or destruction occurred without the fault or neglect of this affiant, and that the loss or destruction of deeds, unless supplied, may result in damage to this affiant, who also states that all the foregoing facts enumerated in said cross-bill are true, as he verily believes.

JOHN J. SLEVIN.

Signed and sworn to before me this 27th February, A. D. 1877. In testimony I here have to set my hand and my seal of office the date aforesaid.

JOHN H. GIERARD, JR.,
[SEAL.] *Notary Public.*

(Endorsed:) Filed March 2, 1877. J. A. Jones, clerk.

Exhibit "C" to Cross-Bill.

Proposition for composition. Confirmed by U. S. court Ap'l 10th, 1876.

District Court of the U. S. for the South'n Dist. of Ohio.

In the Matter of J. AND J. SLEVIN AND CO., Bankrupts. No. 1711.

To whom it may concern: .

57 I, Thomas Ambrose, clerk of the United States district court for the southern district of Ohio, do hereby certify that J. and J. Slevin & Company above named have effected a composition with their creditors under the bankrupt law of the United States; that under said composition John F. Slevin, August Trum, and Anthony Shouter were duly nominated and appointed trustees of said bankrupts, and that said composition and ap-ointment of said trustees has [have] been duly approved and confirmed by the

court, and that said trustees have full power and authority to collect and receive all claims, accounts, notes, and demands of whatever kind and nature due and owing or to become due and owing to the said bankrupts; also to adjust and compromise all such claims, notes, accounts, and demands due or to become due and owing as aforesaid, together with such other power and authority as is vested in them by the bankrupt law aforesaid.

THOMAS AMBROSE,
Clerk U. S. Dist. C't, S. D. O.

58 We, the undersigned, being the trustees above named, hereby certify that we have executed and delivered to James L. Slevin a power of attorney authorizing him to collect and receive the outstanding debts, accounts, notes, and claims due and owing to the said J. and J. Slevin & Co. and to receipt for the same in our names, place, and stead. Debtors of said J. & J. Slevin & Co. are therefore hereby requested to make payment to our said attorney-in-fact.

Cincinnati, Ohio, April 25, 1876.

JOHN J. SLEVIN,
AUGUST TRUM,
A. SHOUTER,
Trustees of J. and J. Slevin and Co.

(Endorsed:) Filed March 2, 1877. J. A. Jones, clerk.

59 And afterwards, to wit, on Monday, the 5th day of March, at the January term of said court, in the year last aforesaid (1877), the following proceedings were had by said court in said cause and entered of record, to wit:

Rule to Answer Cross-Bill.

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN *et al.*
} In Chancery. 4933.

On motion of complainants in cross-bill, by William J. Conkling, Esq., their solicitor, the defendants in said cross-bill are ruled to answer said cross-bill by the 1st Monday of April next.

And afterwards, to wit, on Monday, the 2d day of April, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Default of Def'ts in Cross-Bill and Refference to Master.

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN & JOHN SLEVIN.
} In Chancery. 4933.

60 This day come again James Slevin and John Slevin, complainants in cross-bill filed in this cause, by W. J. Conkling,

Esq., their solicitor, and Leander J. S. Turney and Robley D. Adams, defendants in said cross-bill, having failed to file their answer as required by the rule of court herein entered, it is therefore ordered and adjudged that the default of said defendants in cross-bill be, and the same is hereby, accordingly entered of record and the said cross-bill be taken *pro confesso* against them.

Whereupon this cause is referred to the master in chancery of this court to take proof and make report thereof to this court.

And afterwards, to wit, on the 10th day of April, in the year last aforesaid (1877), came the defendants to the cross-bill and filed their demurrer to said cross-bill in said cause; which said demurrer is in the words and figures following, to wit:

61 *Demurrer to Cross-Bill.*

UNITED STATES OF AMERICA, *Southern District of Illinois:*

January Term, A. D. 1877.

LEANDER J. S. TURNEY *et al.*
vs.
JOHN SLEVIN *et al.* } Chancery.

And now comes the respondents to the cross-bill filed herein by John Slevin *et al.*, and for answer say that the matters and things alleged in said cross-bill herein filed are informal, *are informal*, uncertain, and insufficient in law, and said complainants to the original petition filed in this cause are not bound to answer the same.

Wherefore the said respondents to said cross-bill pray the judgment of this honorable court, and for special causes of demurrer assign the following:

1st. That John Slevin and John P. Slevin and August Trum and Anthony Shouter are made parties to the cross-bill filed herein, who are not parties to the original action.

62 2d. That there is a want of proper parties to the cross-bill filed herein.

3d. The matters alleged in said cross-bill do not entitle said complainants to the relief prayed for by the complainants in said bill.

4th. Said cross-bill is, in other respects, informal and insufficient, &c.

4½. No exhibits are filed.

5th. This court has no power or jurisdiction to grant the relief prayed.

R. P. HANNA, *Att'y.*

(Endorsed:) Filed April 10, 1877. J. A. Jones, clerk.

And afterwards, to wit, on Wednesday, the 11th day of April, at the said January term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Setting Aside Default of Def'ts in Cross-Bill, &c., and Sustaining Demurrer.

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN *et al.*
} In Chancery. 4933.

63 This day again come the parties, and it is ordered that the decree *pro confesso* on cross-bill and reference to master herein entered be set aside and demurrer to cross-bill sustained, with leave to complainants to amend original bill in 30 days and rule on defendants to answer in 30 days thereafter, and this cause referred to the master in chancery to take proof.

And afterwards, to wit, on Wednesday, the 20th day of June, at the June term of said court, in the year last aforesaid (1877), the following further proceedings were had in said court in said cause and entered of record, to wit:

Leave to Amend Cross-Bill.

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN *et al.*
} In Chancery. 4933.

On motion of John Slevin *et al.*, trustees of J. & J. Slevin & Co., complainants in cross-bill, by Messrs. J. C. and C. L. Conk-
64 ling, their solicitors, leave is granted to amend said cross-bill, with rule on Leander J. S. Turney and Robley D. Adams to answer the same in thirty days.

And afterwards, to wit, on Wednesday, the 31st day of December, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy-nine, the following further proceedings were had in said court in said cause and entered of record, to wit:

Decree of December 31st, 1879, and Reference to Master.

LEANDER J. S. TURNEY and ROBLEY D. ADAMS
vs.
JAMES SLEVIN and THOMAS SLEVIN.
} Original Bill.

4933.

JOHN SLEVIN, THOMAS E. SLEVIN, and JAMES L. Slevin, and John F. Slevin, August Trum, and Anthony Shouter, Trustees of J. & J. Slevin & Co.,
vs.
LEANDER J. S. TURNEY & ROBLEY D. ADAMS.
} Cross-Bill.

65 And now, on this 31st day of December, A. D. 1879, came the complainants in the original bill herein, by R. P. Hanna,

their solicitor, and the respondents herein, by William J. Conkling, come also; and this cause came on for hearing upon the petition filed herein and answer thereto and the cross-bill filed herein, and the court doth find that during the pendency of this suit complainant Leander J. S. Turney has conveyed all his interest in the land and real estate described in the petition herein to complainant Robley D. Adams, who is now the lawful and equitable owner of the same (subject to the incumbrances hereinafter described).

And the court doth further find that the pretended deed executed on the 21st day of July, A. D. 1863, by Joseph G. Barkley, master in chancery of Wayne county, Illinois, to John Slevin and James Slevin, and recorded in Book "P" of Deeds, at pages 327, 328, 329, and 330, to the northwest quarter of the northwest quarter of section six, in township two (2) south, of range eight (8) east, and the pretended deed executed to the east half of section
66 thirty-six, in township one south, of range seven east, in Wayne county, Illinois, on the 21st day of July, A. D. 1862, by the said Joseph G. Barkley, master in chancery of Wayne county, Illinois, to John and James Slevin, and recorded in Deed Book P of Deed Record Book of Wayne county, Illinois, at pages 330, 331, 332, 333, 334, 335, 336, 337, 338, and 339, were both executed by said Joseph G. Barkley, mastery in chancery as aforesaid, without any decree of record of the circuit court of Clinton county, Illinois, authorizing such deeds to be made or without any lawful authority in said Barkley for so doing; and the court doth therefore order, adjudge, and decree that both of said pretended deeds and all other deeds to said John Slevin on said lands are absolutely null and void and are a cloud upon the title of the complainant, Robley D. Adams, who is now the lawful and equitable owner of all of said real estate above described in fee simple, except the southwest quarter of the southeast quarter of section thirty-six (36), township one
67 south, range seven east, heretofore sold to Oliver Holmes.

And the court doth further adjudge that the said John Slevin and James Slevin, their heirs, assigns, and legal representatives, be restored to all their legal and equitable rights under their mortgages on said lands executed to them; also said Beecher and said Eldridge, by said Turney and wife, as well as by said Turney to one Edward Beecher, and as well as by said Turney to one Charles W. Eldridge, as specified in the respondents' cross-bill filed herein, both of which belong to and were purchased by said J. & J. Slavin, except as to such portion of said real estate as shall have been conveyed by said John and James Slevin or their heirs, agents, assignees, or trustees before the rendering of this decree.

And the court doth further decree that said John and James Slevin and their heirs, assigns, and legal representatives also be allowed, in addition to their rights under their said mortgages, all taxes and interest thereon, as well as all costs and interest thereon in
68 the State and Federal courts paid by them on said real estate, the same to be a lien on said land.

And the court doth further decree that from such amount due on said mortgages and the taxes and interest, &c., paid by said defend-

ants on said land shall be deducted all rents and profits derived from said land by said John Slevin and James Slevin or those holding under them for such times as they or those holding under them have been in possession of said land or any part thereof, and all valuable improvements removed from said premises or destroyed by those in possession of said premises under and by the authority of said respondents, John and James Slevin, or their agents, by their like authority, since they first took possession of the same, and for all moneys received by the respondents, James and John Slevin, as a payment on the notes secured by said mortgages; and also all sums the said respondents may have, either by themselves or their attorneys or agents, received on said notes by reason of the sale of any town lots or other real estate or personal property
69 under any judgment or judgments or decrees against the said Leander J. S. Turney upon said notes; and also all moneys received by the said respondents by reason of any sale made of any other lands exclusive of said N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ sec. 6, T. 2 S., R. 8 E., and the E. $\frac{1}{2}$ of section 36, T. 1 S., R. 7 E., for the payment of said notes, either at public or private sale, to any person or persons whomsoever; that all such sums so secured by said respondents, either by themselves, their agents, or attorneys, shall be entered and placed as a credit on said sums so secured by said mortgages as of the date the same was received.

It is further ordered, adjudged, and decreed by the court that the said respondents and all parties holding by, through, or under them who have purchased any of said lands *and* since the filing of the original bill in this cause surrender the possession of said lands, to wit, the east half of section thirty-six (36), township one (1) south, of range seven (7) east, (except the southwest quarter of the
70 southeast quarter of section thirty-six (36), township one (1) south, of range seven (7) east, heretofore sold to Oliver Holmes); and said respondents, John and James Slevin, and their heirs, attorneys, agents, trustees, and assignees and all persons holding under them shall also surrender immediate possession of the northwest quarter of the northwest quarter of section six, township two (2) south, of range eight (8) east, in Wayne county, Illinois, to Robley D. Adams whenever they shall be notified by said Adams so to do, and also served with a certified copy of said decree. It is also ordered that this cause be referred to John A. Jones, master in chancery of this court, to take and report the evidence in this cause according to the foregoing decree.

And afterwards, to wit, on the 16th day of September, in the year of our Lord one thousand eight hundred and eighty, came John A. Jones, master in chancery, and filed in said clerk's office his report in said cause; which said master's report is in the words and figures following, to wit:

71 *Report of John A. Jones, Master in Ch'y.*

In the Circuit Court of the United States for the Southern District of Illinois.

L. J. S. TURNEY *et al.* vs. J. and J. SLEVIN *et al.* } In Chancery.

The report of John A. Jones, master in chancery of said circuit court, to whom this cause was refer-ed, by decree of the court entered December 31, 1879, to take and report the evidence in accordance with the terms of said decree of reference.

Said master to the hon. judge of said court reports as follows:

That on May 18th, 1880, he took the testimony in writing of Archibald Missieleer, a witness on behalf of defendants; which said testimony is made part of this report and marked "Exhibit No. 1."

Complainants, by R. D. Adams, their solicitor, at the time of taking testimony objected to the same; which objection is noted on margin of said "Exhibit No. 1." This is all the testimony on part of defendants.

72 Said master further reports that on May 31, 1880, John L. Handley, N. P., of Wayne county, Illinois, at his office, in Fairfield, in said county, took the deposition of Richard S. Boggs, William W. George, Adams Rinard, Oliver Holmes, Ezra T. Hall, and Gilbert J. George, witnesses on behalf of complainants; which said depositions are made part of this report and marked Exhibit "No. 2;" which depositions were filed in the clerk's office June 15, 1880.

All which is respectfully submitted September 16, 1880.

J. A. JONES,
M. C. U. S. C. C., S. D. Ill.

(Endorsed:) Filed September 16, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 7th day of April, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-one, the following further proceedings were had in said cause and entered of record, to wit:

73 *Order Allowing Parties to Take Depositions, &c.*

LEANDER J. S. TURNEY *et al.* vs. JAMES SLEVIN *et al.* } In Chancery. 4933.

In this cause it is ordered by the court, on motion of the complainants, that they have leave to take the depositions of witnesses residing in Wayne county, Illinois, before John L. Handley, on reasonable notice to the defendants, the depositions, when taken, to be

used before the master of this court in the matter of reference in this cause, and the defendants have the like leave to take testimony on reasonable notice.

And afterwards, to wit, on Thursday, the 17th day of January, at the January term of court, in the year of our Lord one thousand eight hundred and eighty-four, the following further proceedings were had in said cause and entered of record, to wit:

74 *Order Setting Cause for Hearing.*

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN. } In Chancery. 4933.

On motion of defendant, by W. J. Conkling, Esq., his solicitor, this cause is set for hearing on the 5th day of March next.

And afterwards, to wit, on Monday, the 18th day of February, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Resetting Cause for Hearing.

LEANDER J. S. TURNEY
vs.
JAMES SLEVIN. } 4933. In Chancery.

By consent of parties, by their solicitors, this cause is set for hearing on Wednesday, the 12th day of March next.

And afterwards, to wit, on Saturday, the 27th day of De-
75 cember, at the June term of court and in the year last aforesaid (1884), the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Referring Cause to Bluford Wilson, Special Master.

LEANDER J. S. TURNEY and ROBLEY D. ADAMS
vs.
JOHN SLEVIN *et al.* } Original Bill.

4933.

JOHN SLEVIN *et al.*
vs.
LEANDER J. S. TURNEY and ROBLEY D. ADAMS. } Cross-Bill.

And now, on this 27th day of December, 1884, come again the parties, by their counsel, and submit these causes to the court for hearing; and the court, having heard and considered their proofs and allegations, doth order and decree that the causes be referred to Bluford Wilson, one of the masters in chancery of the court, to inquire and ascertain—

First. The amount of principal and interest now due on
76 the three mortgages made by Leander J. S. Turney on the lands in question.

Second. The amount of taxes paid on the mortgaged premises by the defendants in the original bill and the complainants in the cross-bill.

Third. The amount that the defendants in the original bill and complainants in the cross-bill have received from the sale of any of the lands in question.

Fourth. Whether the defendants in the original bill and complainants in the cross-bill have ever had actual possession of the lands in question; and, if so, how much have they received for rents and profits of the same, or how much in rents and profits might they have received therefrom by reasonable care and prudence?

Fifth. The amount in value of any waste in the removal of fences and buildings that the defendants in the original bill and complainants in cross-bill have committed on the lands in question.

77 Sixth. In making these inquiries the master may consider any evidence already taken in the causes, and may also hear and consider any further evidence that may be offered by either of the parties on reasonable notice.

Seventh. The master will report to the court all such further evidence, and also his conclusions on all the foregoing questions.

78 *Complainants' Evidence.*

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

United States Circuit Court, Southern District of Illinois.

L. J. S. TURNEY *et al.*
vs.
JAMES SLEVIN and THOMAS SLEVIN *et al.* } Chancery.

To James Slevin, Thomas Slevin, John Slevin, August Trum, Anthony Shonter, as trustees of J. & J. Slevin & Co.:

You will please take notice that we will appear before John L. Handley, a notary public, of Wayne county, Illinois, at his office, in Fairfield; in said county, at the hour of 10 o'clock a. m., on the 31st day of May, A. D. 1880, and continue from day to day to take the depositions of W. W. George, Wm. Shaeffer, C. W. Sibley, Michael Clark, Emanul Koontz, Griffin Cox, Oliver Holmes, G. J. George, Adam Rinard, Henry Warley, Isaac Richards, Jesse Ward, Francis George, Dr. E. T. Hall, Leander Knowles, Wm. M. Murphy, R. S. Boggs, Lewis J. Rider, and Alexis Rider and other witness- to be produced before said notary, which deposition- when taken will be used as evidence in the trial in the above-styled cause on behalf of
79 the complainants in said cause, when and where you may appear and cross-question said witnesses, if you see fit.

May 8th, 1880.

R. P. HANNA,
Att'y for Comp't-.

STATE OF ILLINOIS, } ss:
Wayne County, }

R. D. Adams, being first duly sworn, on his oath says that he served the foregoing notice on the above-named defendants by delivering to W. J. Conkling a true copy hereof on the 18th day of May, A. D. 1880, at Springfield, Illinois.

Subscribed and sworn to before me this May 28th, 1880.

[SEAL.] JOHN L. HANDLEY,
N. P., Wayne Co., Ills.

UNITED STATES OF AMERICA, } ss:
Southern District of the State of Illinois, County of Wayne, }

Be it remembered that on the thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty,
80 I, John L. Handley, a notary public in and for the county of Wayne and State of Illinois, did call and cause to be and personally appear before me at my office, at Fairfield, in said southern district of Illinois, in the State aforesaid, Richard L. Boggs, William W. George, Adam Rinard, Oliver Holmes, Ezra T. Hall, Gilbert J. George to testify and the truth to say on the part and behalf of the plaintiffs in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of Illinois, at Springfield, in the district aforesaid, wherein Leander J. S. Turney and Robley D. Adams are plaintiffs and James Slevin and Thomas Slevin are defendants in the original bill, and wherein John Slevin, Thomas E. Slevin, and James S. Slevin and John F. Slevin, August Trum, and Anthony Shanter, trustees of John Slevin and James Slevin, etc., are plaintiffs and Leander J. S. Turney and Robley D. Adams are defendants in the cross-bill.

Testimony of Rich'd L. Boggs.

And the said RICHARD L. BOGGS, being about the age of
81 sixty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Richard L. Boggs, and he did thereupon depose, testify, and say as follows, viz:

Question 1. What is your name, age, occupation, and place of residence?

Ans. Richard L. Boggs; age, sixty-eight years; physician; Fairfield, Wayne county, Illinois.

Question 2. How long have you resided in Wayne county?

Ans. About 41 years.

Q. 3. Are you acquainted with the E. ½ of sec. 36, T. 1 S., R. 7 E., in Wayne county, and when was it first under fence and in cultivation?

Ans. It was put under fence and in cultivation in the year 1854,

and was under fence and in cultivation when the Slevins took possession, in July, 1863. I know the land well.

Q. 4. What was the annual rental value of said lands in July, 1863, when the Slevins took possession of the same, in the condition it was in at that time?

Ans. Two dollars per acre; but by being well managed it would realize about three or four dollars per acre by renting for the third of the crop.

82 RICHARD L. BOGGS.

Subscribed and sworn to before me this 31st day of May, A. D. 1880.

JOHN L. HANDLEY, *N. P.*

Testimony of Wm. W. George.

Also at the same time and place came WILLIAM W. GEORGE, who, being first duly sworn, in reply to the interrogatories, deposes and says:

Question 1. What is your name, age, occupation, and place of residence?

Ans. William W. George; age, sixty-eight years; justice of the peace; Fairfield, Wayne county, Illinois; I was county judge for 4 years.

Ques. 2. How long have you resided in Wayne county, Illinois?

Ans. Nearly fifty years.

Q. 3. Are you acquainted with the E. ½ of sec. 36, T. 1 S., R. 7 E., in Wayne county, Illinois?

Ans. I am.

Q. 4. When was it first under fence and put in cultivation?

Ans. In 1854. I superintended the fencing and cultivation that year myself as agent for L. J. S. Turney.

Question 5. What was the annual rental value of said land
83 in the year 1863, when the Slevins took possession of the same, in the condition it was in at that time?

Ans. About two dollars per acre or one-third of the crop. The land was all under fence at that time, in the same year, 1854. I fenced and cultivated for L. J. S. Turney the N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E. The rental value of this land when the Slevins took possession, in 1863, was the same as the other land; it wall [was] all good land, in good condition for farming.

Q. 6. What would be the rental value of all the said lands from the time the Slevins took possession, in 1863, to the present time per year?

Ans. It would average about the same. Two dollars per acre for each year since that time if rented for cash rent; if rented for the third of the crop more might have been realized for it.

W. W. GEORGE.

Subscribed and sworn to before me this 31st day of May, 1880.

JOHN L. HANDLEY, *N. P.*

84 *Testimony of Adam Rinard.*

Also at the same time and place came ADAM RINARD, who, being first duly sworn, in reply to the interrogatories, deposes and says:

Question 1. What is your name, age, occupation, and place of residence?

Ans. Adam Rinard; 45 years; occupation, farmer; last four years sheriff of Wayne county, Illinois; residence, near Fairfield, in said Wayne county.

Question 2. How long have you resided in Wayne county?

Ans. Thirty-eight years

Question 3. Are you acquainted with the E. ½ sec. 36, T. 1 S., R. 7 E. and N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., in Wayne county, Illinois?

Ans. I am.

Question 4. What would have been the rental value of the said lands from the time the Slevins took possession thereof, in 1863, to the present time if kept under fence?

Ans. One-third the crop or two dollars per acre, cash, each year.

Q. 5. Was this land all susceptible of cultivation from 1863 up to the present time?

Ans. All, except about 60 or 70 acres, which is in timber, all the rest being good tillible land.

Ques. 6. Was there any buildings on the land; and, if not, how would that effect the rental value?

85 Ans. No buildings of value; but it would rent for the amount stated without buildings, being near to the town of Fairfield. There never was a time but that it could be rented.

ADAM RINARD.

Subscribed and sworn to before me this 31st day of May, 1880.

JOHN L. HANDLEY, *N. P.*

Testimony of Oliver Holmes.

Also at the same time and place came OLIVER HOLMES, who, being first duly sworn, in reply to the interrogatories, deposes and says:

Ques. 1. What is your name, age, occupation, and place of residence?

Ans. Oliver Holmes; 41 years; farmer and deputy county clerk; near Fairfield, Wayne county, Illinois, and was eight years county clerk of Wayne Co., Ills.

Ques. 2. How long have you resided in Wayne county, Illinois?

Ans. About 27 years.

Ques. 3. Are you acquainted with the E. ½ sec. 36, T. 1 S., R. 7 E. and N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., in Wayne county, Illinois?

Ans. I am.

86 Question 4. Did you purchase any of said lands from John and James Slevin; if so, at what time, and what did did you pay them for the same?

Ans. I purchased from John and James Slevin the S. W. ¼ S. E. ¼ sec. 36, T. 1 S., R. 7 E., on or about the month of April, 1872, for the sum of sixteen hundred dollars cash in hand. I am still the owner and reside on the said land.

OLIVER HOLMES.

Subscribed and sworn to before me this 31st day of May, 1880.

JOHN L. HANDLEY, *N. P.*

Testimony of Ezra T. Hall.

Also, at the same time and place, came EZRA T. HALL, M. D., who, being first duly sworn, in reply to the interrogatories, deposes and says:

Question 1. What is your name, age, occupation, and place of residence?

Ans. Ezra T. Hall; 42 years; physician; Fairfield, Wayne county, Illinois.

Question 2. How long have you resided in Wayne county, Ills.?

Ans. 16 years or over.

87 Question 3. Are you acquainted with the E. ½ of sec. 36, T. 1 S., R. 7 E., and the N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., in Wayne county, Illinois?

Ans. I am.

Question 4. What would be the rental value of said lands for the last 16 years?

Ans. About two dollars per acre, cash, or one-third of the crop each year.

Question 5. Have you been engaged in renting in Wayne county?

Ans. I have for the last ten or twelve years. I have owned during that time from five to fifteen hundred acres, part of which I have been renting.

Question 6. What is it worth to build one mile of rail fence during the last ten years?

Ans. It would take about 7,000 rails and would cost, at that time, about $210.00 per mile, and it would take about 35,000 rails to fence the whole of said land at a cost of about $1,050.00.

E. T. HALL, M. D.

Subscribed and sworn to this 31st day of May, A. D. 1880.

JOHN L. HANDLEY, *N. P.*

88 *Testimony of Gilbert J. George.*

Also, at the same time and place, came GILBERT J. GEORGE, who, being first duly sworn, in reply to the interrogatories, deposes and says:

Question 1. What is your name, age, occupation, and place of residence?

Ans. Gilbert J. George; 40 years; attorney-at-law; Fairfield, Wayne county, Illinois.

Question 2. How long have you resided in Wayne county?

Ans. 24 years.

Question 3. Are you acquainted with the E. ½ of sec. 36, T. 1 S., R. 7 E., and the N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E.?

Ans. Yes; I am acquainted with the land.

Question 4. Was the said lands ever under fence and in cultivation; if so, when?

Ans. Said lands were all under fence and in cultivation in the year 1856. L. J. S. Turney was then in possession of said lands.

Question 5. Do you know who received possession of said lands from L. J. S. Turney?

Ans. J. and J. Slevin, through C. A. Beecher, their agent, in 1863, as I am informed by the parties.

Question 6. What was a fair rental value of said lands from the time the Slevins took possession in 1863 until 1869, in addition to paying taxes and keeping fences on said land in repair?

Ans. About $1.50 per acre per annum.

89 Question 7. Did you ever act as agent for the Slevins to look after said lands?

Ans. I was from 1869 up to the present time the agent of said Slevins to look after said lands.

Question 8. Who had possession of said land during all of that time?

Ans. The Slevins had, except during a few weeks in 1876, when L. J. S. Turney took possession of said lands.

Question 9. Who took possession from Turney, in 1876, of said lands, and how was possession obtained?

Ans. Within a few weeks after Turney took possession of said lands, in 1876, I, as attorney for John and James Slevin, instituted proceedings against Turney's tenant, and said tenant of Turney vacated the premises and the Slevins took possession of said land before any trial was had, and the Slevins have held possession from that time to the present year, when the interlocutory order in this cause was made, given [giving] complainant possession of said land.

Question 10. Did the Slevins rent or lease any of said lands while they were in possession?

Ans. They did—a portion of the N. W. ¼ N. W. ¼, sec. 6, T. 2 S., R. 8 E.—to Rider Bros., who have held possession for the Slevins since about the year 1869. I do not know what rent they have

90 paid the Slevins, but they have paid the taxes for the Slevins. I do not know what they have paid the Slevins in addition to the taxes.

Question 11. Is there any fence or improvement on said lands at this time?

Ans. Yes; the N. W. ¼ N. W. ¼, sec. 6, T. 2 S., R. 8 E., is all under good fence at this time. There is no fencing or improvement of any kind on the balance of said land at this time.

Question 12. What length of fence will it require to fence the E. ½ of sec. 36, T. 1 S., R. 7 E., and what is it worth to fence it?

Ans. It will take about $700.00 to fence the portion of land not now fenced.

Question 13. Do you know of the Slevins selling lands they received from Turney, under their mortgage, to any persons; if so, when and how much did they receive for the same?

Ans. They received from Oliver Holmes $1,600.00 for one 40 acres and from D. W. Barkley $450.00 for a town lot, in town of Fairfield. This was, I think, in the year 1872. I don't know that they sold any other lands.

Question 14. Do you know who remove- the house Turney built on said lands?

Ans. I do not. I know the house Turney put on said land
91 was moved off shortly after the Slevins got possession.

Question 15. Do you know anything of the improvements on said lands in the years 1862, 1863, & 1864?

Ans. My recollection is that in 1863, in the month of May, that the E. ½ of sec. 36, T. 1 S., R. 7 E., was under fence and a portion of said land had been plowed and a portion was sowed in wheat at that time. I came through in May of 1863 and the fence was down, but shortly after the fences were all up. I was at home on a furlough at the time from the army, and had no opportunity to observe the land after that time until I returned from the army, in 1864.

Question 16. Who has been in possession of said land and paying taxes on the same since you returned from the army, in 1864?

Ans. J. & J. Slevins, and for whom our firm of Beecher, George & Sailor have pay [paid] taxes on said lands for each year consecutively up to the year 1879.

G. J. GEORGE.

Subscribed and sworn to before me this 31st day of May, 1880.
JOHN L. HANDLEY, *N. P.*

92 UNITED STATES OF AMERICA, } *ss:*
Southern District of the State of Illinois, County of Wayne, }

I, John L. Handley, a notary public in and for the county of Wayne and State of Illinois, do hereby certify that the reason for taking the foregoing depositions is and the fact is that the testimony of the said witnesses are [is] material and necessary for the plaintiffs in the original bill and the defendants in the cross-bill in the cause in the caption of the said deposition- named, and that the said witnesses lives [live] and did live, at the time of taking said deposition-, in and near the town of Fairfield, county of Wayne, and State of Illinois, the same being at a greater distance than one hundred miles from the city of Springfield, where the court at which it is expected the said cause will be tried was appointed by law to be held, to wit, more than one hundred miles therefrom.

I further certify that on the 31st day of May, A. D. 1880, I was attended at my office, in Fairfield, county of Wayne and State of Illinois aforesaid, by Robert P. Hanna, attorney for L. J. S. Turney

and Robley D. Adams, parties herein, and the witnesses,
93 Richard L. Boggs, William W. George, Adam Rinard, Oliver Holmes, Ezra T. Hall, and Gilbert J. George, who were of sound mind and lawful age; and the witnesses were by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence. I have retained the said deposition- in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition-, with my own hand to the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said depositions and caption named, or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal this 31st day of May, in the year of our Lord one thousand eight hundred and eighty and of the Independ-
94 ence of the United Seates the one hundred and fourth.

JOHN L. HANDLEY,
N. P., Wayne County, Illinois.

(Endorsed:) Filed June 15, 1880. J. A. Jones, clerk.

95 UNITED STATES OF AMERICA, *State of Illinois:*

United States Court, Southern District of Illinois.

L. J. S. TURNEY *et al.*
vs.
J. J. SLEVIN *et al.* } Chanc'y.

The defendants in above-styled cause will please take notice that complainants will proceed on the 3rd day of March, 1885, at the office of John L. Handley, mastery in chancery of Wayne county, Illinois, at his office, in Fairfield, Illinois, at the hour of 10 o'clock a. m. of said day, to take the evidence of John Geddis, Samuel Linder, G. J. George, Albert Sloan, and other witnesses to be used as evidence in said cause on the part of the complainant- in the original bill in said cause, and the evidence will be taken on the interrogatories as follows:

Interrogatories to be Propounded to Each of said Witnesses that Shall be Produced.

Interrogatory 1st. State your name, age, occupation, and place of residence.

Interrogatory 2nd. Do you know the parties, complainants & respondents, in said cause or either of them?

96 Interrogatories 3rd. Are you acquainted with the land in dispute in this cause? If yes, state how long you have known it.

Interrogatory 4th. Do you know anything about the timber on said lands? If you know of any timber being cut on said lands, state when, how much, and who cut it, and by whose orders it was cut; also state the value of all timber cut or destroyed & how many trees, as near as you can.

Interrogatory 5th. Were there any buildings erected on any part of said lands? If yes, state who built them, when they were built, and what became of them, if you know.

Interrogatory 6th. If you know what became of the buildings on said lands, state it fully.

Interrogatory 7th. State, if you know, the rental value of any such building, together with any inclosures therewith. If yes, state all you may know about it; state also the value of such building.

Interrogatory 8th. Do you know about any rails being moved from the west part of said land to the southeast forty acres
97 of said land? If yes, state, as near as you can, when said rails were removed, by whom, and what was done with the fencing on said lands.

Interrogatory 9th. Do you know of any one purchasing any of said lands from the respondents in this suit or the complainants in the cross-bill filed in this cause or any or either of them? If yes, state who it was & how the purchaser procured the possession of said land, if any possession was given him or procured by them.

Interrogatory 10th. State all you may know, if anything, about the possession of said land from the year 1863 to the present time.

Interrogatory 11. Do you know anything about any suit having been instituted by the respondents or any of them to recover possession of said land from the complainant, L. J. S. Turney, for forcibly entery on said lands? If yes, state all you may know about any such suit.

Interrogatory 12th. State any other fact or circumstance you may know of interest to either complainants or respondents in this suit.

R. P. HANNA,
98 *Sol. for Comp't Adams.*

Copy delivered and time waived.

PALMER, ROBINSON & SHUTT,
For Def'ts.

Feb. 27, 1885.

The undersigned mastery in chancery of Wayne county, Illinois, who was appointed by order of the circuit court of the United States for the southern district of Illinois to take depositions in the following causes, to wit: In equity, original bill—Leander J. S. Turney and Robley D. Adams *vs.* John Slevin and others; cross-bill—John Slevin and others *vs.* Leander J. S. Turney and Robley D. Adams, to be read as evidence on the trial of said causes, do hereby certify that, in pursuance of the notice, interrogatory-s on the part of com-

plainants in the original bill and cross-interrogatorys on the
99 part of the defendants in the original bill to take the depositions of the witnesses — hereto attached.

I further certify that all of said witnesses were duly sworn according to law to true answers make to the interrogatories and cross-interrogatories in said notice set forth, and the answers to said in-interrogatories and cross-interrogatories are as herein set forth; that the evidence was taken at my office, in the town of Fairfield, county of Wayne and State of Illinois, between the hours of ten o'clock a. m. and six o'clock p. m. of the third day of March, A. D. 1885.

And now, on this third day of March, 1885, at my office, in Fairfield, Illinois, came ALBERT SLOAN, who, after being duly sworn to testify in the foregoing cause, deposed as follows:

Depositions of Albert Sloan.

To interrogatory 1st. My name is Albert Sloan; my age is 37 years; my residence is Fairfield, Illinois; my occupation a farmer.

100 To interrogatory 2nd. I have known L. J. S. Turney for more than 30 years. I knew him at the time of his death. I have known Robley D. Adams about 25 years. I am not personally acquainted with the defendants in the original bill.

To interrogatory 3rd. I am acquainted with the land described as the N. W. ¼ N. W. ¼, sec. 6, T. 2 S., R. 8 E., and E. ½ sec. 36, T. 1 S., R. 7 E. This land was formerly owned by L. J. S. Turney, and he had it in his possession in 1860 and it was all in cultivation and it was all under fence. Mr. Turney left and went to Washington Territory in 1861; at that time it was in cultivation. L. J. S. Turney did not return to Fairfield until 1869. The Slevins had this land in possession all the while Mr. Turney was in Washington Territory. They rented it to John B. Gash to put it in corn. I helped plant the corn for John B. Gash. The land then was under sufficient fencing to protect the crops while Gash had it in corn.

Some years after this G. J. George, as agent for Slevins, sold
101 a house that was standing on the land to Moses Nalley, and I purchased the house of Moses Nalley and removed it to a lot adjoining the land in Fairfield. This was in the year 1876. It is the house that John Powell lives in now. It still stands on the lot I moved it on. The house is worth $700 or $800. It will rent for $8.00 per month readily, and would at the time it was moved, and would have rented for that amount on the land where it stood, as it was only moved about one hundred yards.

To interrogatory 4th. When Turney left for Washington Territory, in 1861, there was about 80 acres of excellent good timber (mostly white oak) on said land, and about the year 1875 a large amount of the timber was cut and sold off of said land. Said timber was sold by G. J. George, as agent for the Slevins. The Slevins had had possession of the land for about ten years before that time. They took possession in the summer of 1863, and had peaceable pos-

session of all of said land from about 1863 until about 1875, and during that time all the good timber was cut off of said land.
102 It was sold by G. J. George, acting as the agent of John & James Slevin. A great amount of cord wood was also cut and sold off of said land by G. J. George during that time, and also G. J. George, as agent for Slevins, had a number of men making rails on said land. Samuel Linder, John Fitzgerald, William Venerable, and several other parties were engaged in cutting wood and making rails and cutting logs on said land in the years 1874 & 1875, 1876. They were employed by G. J. George, as the agent of Slevins, to — said work. All the said land was in the possession of the Slevins at that time, except one 40 which was leased by the Slevins to Lewis J. Pider and one 40 which had before been sold to Oliver Holmes. He had one 40 in his possession, having purchased it of the Slevins. He still has it in his possession and all under improvement.

To interrogatory 5th. There was a house on said lands, as stated in my answer to interrogatory third, and G. J. George was controlling the land and house, as agent of Slevins, and I rented the
103 house of him while it stood on this land and paid him the rent. This was in the year 1874 or '75. Mr. George afterwards sold the house to Nalley, as above stated, and I purchased the house of Nalley and removed it off the land. L. J. S. Turney had built the house. I know that Harvey Stewart rented the house and land before I lived there, while George & Saylor was the agents of Slevins and had possession of the lands. He lived there all one winter and part of the summer; I think about nine months or more in all.

To interrogatories 6, 7, 8, & 9. I know nothing except above stated.

To interrogatory 10. I know John and James Slevin had a part of the land rented to John B. Gash in the years 1864 & '5. He had a part of it in corn—I think about thirty-five acres—and paid them the rent. My uncle, Henry Baker, and myself planted and attended the corn for John Gash. John Gash also rented of the Slevins a portion of the land to pasture cattle on either that year or
104 the year after, and he rented of the Slevins for that purpose. About this time or the year after a man by the name of Wooder rented a portion of this land of the Slevins, and had it in corn and, I think, a part in oats.

To interrogatory 12. I know of nothing else of interest to either party.

A. SLOAN.

Subscribed and sworn to before me this 3rd day of March, A. D. 1885.

JOHN L. HANDLEY,
Master in Chancery.

Deposition of Amanda Gaston.

And at the same time and place came AMANDA GASTON, who, being first duly sworn, on her oath says:

To interrogatory 1st. My name is Amanda Gaston; my age is 49 years; my residence, Wayne county, Illinois.

To interrogatory 2d. I have known L. J. S. Turney for 35 years. I have known Robley D. Adams 20 years. I have no ac-
105 quaintance with John and James Slevin, except by heresay.

To interrogatory 3rd. I know that John B. Gash had the land in question rented from John and James Slevin during the years 1864 and 1865, and had a part of the lands planted in corn and part of the land for pasture, and that Albert Sloan and Henry Baker worked for John B. Gash during those years in the corn crop. At the time this work was done Henry Baker was my husband. Henry Baker is now dead. Albert Sloan is my nephew, and this is why I know the facts above stated. Albert Sloan was living with me at the time he did the work.

I know of nothing of benefit to either party under any of the interrogatories herein except above stated, except that L. J. S. Turney went to Washington T'y in 1861 and did not return to Illinois until about A. D. 1869 or '70.

AMANDA GASTON.

Subscribed and sworn to before me this 3rd day of March, 1885.

JOHN S. HANDLEY,
Master in Chancery.

106 *Deposition of Malinda Knight.*

Also at the same time and place came MALINDA KNIGHT, who, being duly sworn, on her oath deposes and says:

To interrogatory 1st & 2nd. My name is Malinda Knight; age, 50 years; residence, Wayne county, Illinois. I am acquainted with the parties to this suit.

To interrogatory 3rd. I know the land in controversy in this suit. It is the east half of sec. 36, T. 1 S., 7, and northwest northwest, sec. 6, T. 2 S., 8 E., in Wayne county, Illinois. I have lived in sight of the land most of the time for 30 years. Mr. Turney had the land under fence and in cultivation when I first knew it.

To interrogatory 4th, 5, 6, 7, 8, & 9. I answer that I know nothing that may not be answered under interrogatory tenth.

To interrogatory 10th. L. J. S. Turney left Illinois for Washington Territory in the summer of 1861, and remained there until the year 1869, when he returned to Fairfield. My husband, John B. Gash, rented a part of the east half of section 36, T. 1 S., R. 7
107 E., from John and James Slevin in the years 1864 & 1865. Part of it he had in corn—about 30 or 35 acres—and paid them

the rent for the same. Albert Sloan, Henry Baker, and Jerry Windle worked for John B. Gash at the time, attending the corn. Henry Baker and Jerry Windle are both dead at this time; John B. Gash died in the year 1866. I was married to him at the time and know that he rented this land the last two years of his life, which would be the year- 1864 and 1865. I know he paid the Slevins rent for these two years, but could not say whether he rented the land before those years or not. He also had a portion of the lands rented at the same time for pasture and pasture- cattle on the land during the year 1864. He cut corn up in the fall to winter the cattle on. Except the portion he paid to John and James Slevin for rent, the land was all under fence at that time and could have been rented. I know that there was a house on the land at that time and a family living in it, but I don't remember now what family it was; this house has been removed from the land, but I don't know who moved it. The Slevins entered into possession
108 of the land a year or two before John Gash rented it from them. I think they got possession about the year 1862 or '63. I know Turney left the land in 1861 and they took possession shortly afterwards, and retained possession of said land until six or seven years ago. The house that I refer to as being moved off the land was not the house that Albert Sloan moved off. There was two houses removed from said lands while the Slevins had it in possession. I think in the year 1876 all houses and fences had been removed from the land and the lands all thrown out to the commons, except one 40 acres that the Riders had under fence and one 40 acres that Oliver Holmes had purchased of the Slevins some years before. He had that in his possession. It was all under fence and in cultivation at the time.

To interrogatory 11th. I know that about the year 1875 or '76 L. J. S. Turney made an attempt to get possession of a part of said land and put a tenant in one of the houses in the night, and some legal proceeding was immediately commenced by the Slevins
109 or by their attorneys, George & Sailor, to recover possession of said land, and very shortly afterwards Turney was dispossessed and the Slevins got possession of the lands.

To interrogatory 12th. I know of no other fact or circumstances, that I now think of, of benefit to either party in this suit.

MALIND- KNIGHT.

Subscribed and sworn to before me this 3rd day of March, A. D. 1885.

JOHN S. HANDLEY,
Master in Chancery.

110 *Deposition of Jno. T. Fitzgerrald.*

And at the same time and place came JOHN T. FITZJERRELD, who, being first duly sworn, on his oath deposes and says:

Ans. to interrogatory 1st. My name is John T. Fitzgerreld; am

40 years of age; occupation, farmer; residence, Wayne county, Illinois.

Ans. to interrogatory 2nd. I was well acquainted with L. J. S. Turney. I knew him about 25 years before he died. I have known Robley D. Adams about 20 years.

Ans. to interrogatory 3d. I have no personal acquaintance with the Slevins. I know that the firm of Beecher, George and Sailor were the agents of the Slevins.

Ans. to interrogatory 4th. I know the land in question described as follows: N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., and E. ½ sec. 36, T. 1 S., R. 7 E. G. J. George, as agent for the Slevins, employed myself and my brother-in-law, William Venable, to cut wood and make rails and stakes on this land in the years 1874 or 1875. I think we cut 12 or 15 cords of wood or more before I quit, and about 1,000 or 2,000 rails and about 300 or 400 *hundred* stakes. G. J. George, as the agent of Slevins, paid us for the work. I don't remember how many rails or stakes my brother-in-law made after I quit work. We were paid $10.00 per thousand to make the rails and stakes. Rails and stakes after they are made of good
111 white oak such as we had are worth $35.00 per thousand; that would make the timber worth $25.00 per thousand. I know that Samuel Linder was employed about that time to cut and haul saw logs off the land.

Ans. to interrogatory 10th. The lands up to that time was under fence and in cultivation, except the 80 acres of timber, and was in the possession of the Slevins, and G. J. George was acting as their agent. One 40 acres was in the possession and under the control of L. J. Rider, who got possession of the Slevins and is in possession of said land up to this time. About the year 1865 or 1866 Mr. Wooden had a portion of this land rented from the Slevins and had it in corn, and I worked for Mr. Wooden and cut and shocks corn for him on this land. My father also worked for Mr. Wooden on this land at that time in his corn crop. The Slevins had possession of the land, and at that time it was all under fence and all in cultivation except the 80 acres that was timber. The timber land was all inside the fence. John B. Gash had a portion of this land rented from the Slevins and pastured cattle on it. I work- for John B.
112 Gash. This was in the year 1865. The Slevins took possession of the land in the summer of 1863. I know that other logs and timber was sold and taken off the land in 1875 and all the fencing was sold and taken off the land except the fence around the Rider 40 acres. G. J. George sold the timber and rails and had them removed. Mr. George was acting as the agent of the Slevins at the time. I know of nothing connected with this case in any way of interest to the parties except as stated in answer to the above interrogatories.

JOHN T. FITZGERREL.

Subscribed and sworn to before me this 3rd day of March, A. D. 1885.

JOHN S. HANDLEY,
Master in Chancery.

113 *Deposition of Samuel Linder.*

Also, at the same time and place, came SAMUEL LINDER, who, being first duly sworn on the part of complainant in the original bill, deposes and says:

Ans. to interrogatory 1st. My name is Samuel Linder; aged 43 years; occupation, farmer; and reside in Wayne county, Illinois.

Ans. to interrogatory 2nd. I was acquainted with Leander J. S. Turney. I have known him all my life up to the time of his death. I have known Robley D. Adams for more than twenty years. I am not acquainted with the defendants.

Ans. to interrogatory 3rd. I know the land described as the east half of sec. 36, T. 1 S., R. 7 E., and the N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E. I have known this land more than 30 years. It was all under fence and in cultivation before the war.

Ans. to interrogatory 4th. It was cultivated by L. J. S. Turney and his tenants up to the summer of 1863, when the Slevins took possession of said land, by their agents, Beecher, George and Sailor, during the summer and fall of the year 1875. I cut logs on said lands for purpose of being sawed into lumber. I think there was about 200 saw logs cut on the said land. The saw logs were worth from one dollar and a half to two dollars and a half each and would certainly average two dollars each. The logs were cut by
114 the authority of G. J. George, who was the agent for John and J. Slevin, who then claimed to own the land. Mr. George was a member of the law firm of Beecher, George & Sailor. They had had the lands in possession for several years and exercised ownership over it by paying taxes, removing and repairing fences, cutting timber, and selling the same, from the land, and selling and removing houses from the land.

Ans. to interrogatory 12th. They also had Lewis J. Rider in possession of part of this land for several years. Said Rider used the land for pasture. He is still in possession of that portion of the land and has had possession for fifteen years or more. Mr. Rider was put in possession of said land by Beecher, George & Sailor, who were acting as agents for the said Slevins. During the year 1861 Mr. Turney was appointed by President Lincoln secretary of Washington Territory, and immediately went there and remained until December, 1869, when he returned to Fairfield, Wayne county, Ills. During his absence, from the summer of 1863, the Slevins had continuous possession of the said lands by themselves and their agents and exercise- ownership over it. It was all under fence and in cultivation in
115 the summer of 1863, when they took possession of it, and they kept continuous possession of it until 1875, except one 40 acres they sold to Oliver Holmes, and he has held possession of that 40 acres ever since and is now in possession of the same and living on it. He bought it from the Slevins and they gave him possession. Lewis J. Rider also purchased 40 acres from the Slevins, and they gave him possession and he still has possession of it. He had been in possession of that piece, under the Slevins, for several years be-

fore he bought it from the Slevins, and still has possession of it. He used it for pasture while he rented it from the Slevins and still uses it for pasture and meadow. There was a house on the land before Mr. Turney went to Washington Territory, and during his absence and while the Slevins were in possession of the land the house was moved off the land. I don't remember now who removed it. In the winter of 1875 & 1876 there was about 5,000 rails and stakes made on the land. They were made by authority of G. J. George,
as agent of the Slevins, and a portion of them were put on
116 said land and a portion of them were removed from the land.
The rails and stakes when made are worth about $35.00 per thousand, and it was worth about $10 per thousand to make them. I should therefore estimate that the timber used in making the rails and stakes were worth $25.00 per thousand or $125.00 in all. The rails and stakes were made by John Fitzjerreld, William Venable, Charles Swansee, Joseph Williams, and Riley and Charles Rose. A portion of the rails were removed and put on the farm of G. J. George, adjoining this land. These rails and stake- were made by the order and direction of G. J. George, as the agent of the Slevins. There was also a new house built on the land by L. J. S. Turney, which the Slevins sold to Albert Sloan and he moved it off the land.

SAMUEL LINDER.

Subscribed and sworn to before me this 3rd day of March, 1885.

JOHN S. HANDLEY,
Master in Chancery.

117 *Deposition of Harvey T. Stewart.*

And at the same time and — came HARVEY T. STEWART, who, being first duly sworn, on his oath says:

Ans. to interrogatory 1st. My name is Harvey T. Stewart; my age, 34 years; occupation, brick-maker; residence, Wayne county, Ills.

Ans. to interrogatory 2d. I had only a slight acquaintance with L. J. S. Turney; have known Robley D. Adams about 12 years. I have no personal acquaintance with John & James Slevins.

Ans. to interrogatory 3d. I am acquainted with the E. ½ sec. 36, T. 1 S., R. 7 E.

Ans. to interrogatory 10. I leased the whole of this land from John and James Slevin, through G. J. George, their agent, in the year 1874, and G. J. George sent to the Slevins and got a written lease, in duplicate, signed by the Slevins. They held one copy and I held the other. Under this lease I staid on the land until Nov. 1st, 1875. I destroyed my copy of the lease after I moved off the land. After I went on the land under this lease the Slevins, by G. J. George, their agent, furnished me the material to build an addition to the house, and I paid my rent or a portion of it by doing the work on the house. I was to have my fuel off the land on condition that I was to see that no one else took any timber or wood off the land.

118 When I left the land I moved to Christian county, and before I left I notified G. J. George, as the agent of the Slevins, and it was agreeable to him. I left the land before my lease expired. G. J. George told me to let no one take timber off the land; that he had given no person permission to take timber that year and no one had any right to take timber off the land without his permission. The house mentioned above is the same house that Albert Sloan moved off the land to a lot in Fairfield adjoining the land. It is the house that John Powell now lives in. The house had been occupied by a family named Richardson before I moved in.

I have nothing further of interest to state that would be of benefit to either of the parties under the interrogatories hereto attached.

HARVEY T. STEWART.

Subscribed and sworn to before me this 3rd day of March, 1885.

JOHN S. HANDLEY,
Master in Chancery.

119 *Deposition of Joseph Williams.*

Also at the same time and place came JOSEPH WILLIAMS, who, being first duly sworn, on his oath deposes and says:

Ans. to interrogatory 1. My name is Joseph Williams, aged 28 years; occupation, farmer, and live in Wayne county, Illinois.

Ans. to interrogatory 3. I know the E. ½ sec. 36, T. 1 S., R. 7 E., and the N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., and I have known the land about 15 years.

Ans. to interrogatory 2d. I have some little acquaintance with L. J. S. Turney, and I have known Robley D. Adams about 15 years. I was not personally acquainted with the Slevins, but I know the firm of Beecher, George & Sailor, their agents. George and Sailor, of the said firm, had the land in possession as the agents of the Slevins in the years 1874 and 1875, and were cutting and selling timber off the land.

Ans. to interrogatory 4. I was employed by G. J. George to cut saw logs. I worked at the time with Samuel Linder. I think we cut about 100 logs for John Gaddis. The logs were hauled by Henry Snyder, Samuel Linder, and Alexander Johnson. The logs we cut were from good timber, making from two to five logs to the tree. The logs were worth about, on average, from $2 to $2.50 each. I have worked at cutting timber a long time and know the
120 value of timber. I have been engaged in cutting logs this winter. I think Howard Dean and other parties were cutting and hauling logs off the land at the same time. The valuable timber was all sold off the land at that time by George & Sailor, agents of the Slevins.

About or near the same time I was employed by G. J. George, as agent of the Slevins, to cut and make fence rails on said lands. I think I took a contract to make 2,000 rails at $1.00 per hundred, $10.00 per thousand. The rails were worth, after they were made,

$35.00 per thousand. I think the timber would be worth $25.00 per thousand. It was extra good white-oak timber. About 80 acres of the land was timber and the balance was prairie land under cultivation. I think I made between 700 and 800 stakes. They were made out of good sound timber and were worth as much as the rails. G. J. George employed me to make the rails and stakes, and paid me for the work as agent of the Slevins. They called it the Slevin land. I did not know the Slevins myself.

121 Ans. to interrogatory 11. About the winter of 1875 L. J. S. Turney had returned from Washington Territory and endeavored to regain possession of the land from the Slevins, and put a man by the name of Nalley in possession of a house on the land, but the Slevins dispossessed him in a month or two by an action of forceable entry, and the Slevins again had the land in their possession. They had the land in peaceable possession ever since I have known the land, except the month or two stated above, when Turney attempted to take possession of the land by putting a man in the house. The house was immediately sold by G. J. George, the agent of the Slevins, and was moved off the land by Albert Sloan. I helped Sloan move the house off the land. It was moved onto a lot in Fairfield adjoining the land. It is the house that John Powell lives in at this time and is worth from $700 to $800.00, and would readily rent for $800 per month. The house was moved off the land in the fall of the year 1876. I know of nothing else of interest to either of the parties under the interrogatories herein.

J. W. WILLIAMS.

122 Subscribed and sworn to before me this 3rd day of March, 1885.

JOHN S. HANDLEY,
Master in Chancery.

Deposition of John Gaddis.

Also at the same time and place came JOHN GADDIS, who, being first duly sworn, on his oath deposes and says:

Ans. to interrogatory 1. My name is John Gaddis; age, 51 years; residence, Wayne county, Illinois; occupation, miller.

Ans. to interrogatory 2. I was acquainted with L. J. S. Turney before his death, and I have known Robley D. Adams about ten years. I am not acquainted with *with* the Slevins. I know the firm of Beecher, George & Sailor, the agents for the Slevins.

Ans. to interrogatory 3. I am acquainted with the land described as the E. ½ of sec. 36, T. 1 S., R. 7 E., and the N. E. ¼ N. E. ¼ sec. 6, T. 2 S., R. 8 E.

Ans. to interrogatory 4. I bought some logs, I think, in the year 1875 that was cut off the E. ½ sec. 36, T. 1 S., R. 7 E. I bought them from G. J. George, of the firm of Beecher, George & Sailor. He had the land in his possession at the time. I can-

123 not tell exactly how many logs I bought, but think between 40 or 50. I bought the logs in the tree, and cut and hauled

them myself. I paid G. J. George for the logs. I don't remember the amount I paid him, but think the trees would average two logs each, worth about 50 cts. each. The logs I got were inferior. Most of the good logs had been cut off the land and sold the year or two before. The logs I got I hire- Henry Snyder to cut and haul for me.

JOHN GADDIS.

Subscribed and sworn to before me this 3rd day of March, 1885.

JOHN L. HANDLEY,
Master in Chancery.

STATE OF ILLINOIS, } ss:
Wayne County, }

I, John L. Handley, master in chancery in and for said county of Wayne and State aforesaid, do hereby certify that the above and foregoing depositions of Albert Sloan, Amanda Gaston,
124 Malinda Knight, John Fitzgerreld, Samuel Linder, Harvey Stewart, Joseph Williams, and John Gaddis were this day taken before me, at my office, in the city of Fairfield, in said Wayne county, commencing at the hour of 10 o'clock a. m. of said day.

That each of said witnesses were duly sworn to depose the truth and the whole truth in answer to the interrogatories hereto attached, and that each of said witnesses, after his deposition had been written and read over to him, signed his name and swore to the same in my presence.

Given under my hand this 3rd day of March, A. D. 1885.

JOHN L. HANDLEY, [SEAL.]
Master in Chancery.

(Indorsed:) Filed March 6, 1885. J. A. Jones, clerk. Opened at request of Maj. B. Wilson March 7, '85. J. A. Jones, clerk.

125 *Defendants' Evidence.*

In the Circuit Court of the United States for the Southern District of Illinois.

L. J. S. TURNEY *et al.* } In Chancery.
v.
JAMES SLEVIN *et al.* }

Deposition of Arch. Merrielees.

Testimony and proof produced before John A. Jones, master in chancery of said circuit court, at his office, in the city of Springfield, on the 18th day of May, 1880.

ARCHIBALD MIRRIELEES, being first duly sworn, deposes and says, in answer to the following interrogatories:

Int. 1. What is your name, age, residence, and occupation?

Ans. Archibald Mirrielees; 48; Cincinnati, Ohio; accountant and

acting as book-keeper for the trustees of the estate of J. & J. Slevin & Co., in bankruptcy, adjudicated as such in the United States district court for the southern district of Ohio, case No. 1711, and defendant herein.

Int. 2. Are you conversant, as such accountant, with the books and papers of said bankrupts in your charge as such book-keeper, and whether you recognize the papers shown you as part thereof?

126 Ans. I do. This paper marked "Exhibit A" is an original mortgage, dated November 21st, 1853, to secure one note for the sum of $2,000.00, payable 2 years after date, November 21st, 1853, payable to the order of J. & J. Slevin, for value received, and signed by L. J. S. Turney, party to this suit, and acknowledged by said Turney said November 21st, 1853, before J. G. Barkley, clerk of the Wayne county circuit court, upon the E. ½ of sec. 36, T. 1 S., R. 7 E., and N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E.

I also present a transcript of proceedings in the circuit court of Clinton county, Illinois, in a suit of foreclosure of the above-described mortgage by said J. & J. Slevin against said L. J. S. Turney, and the same is marked "Exhibit B" herein.

I also present transcript of proceedings in the circuit court of Clinton county, Illinois, marked "Exhibit C," in a suit in chancery by Charles W. Eldridge against said L. J. S. Turney and others for the foreclosure of a mortgage given on the 6th day of September, 1851, by L. J. S. Turney aforesaid and Elizabeth Turney, his wife, to Charles W. Eldridge, upon the E. ½ of sec. 36, T. 1 S., R. 7 E., to secure the payment of 1 promissory note, signed by said Turney,

127 for — sum of $900.00, payable, as on — before January 1st, 1856, to Charles W. Eldridge or order, with interest from date, 6th September, 1851, annually, and that thereafter the said Slevins, by subsequent proceedings, succeeded to the ownership of said premises and received master's deeds thereon, as will appear in the following exhibits, hereafter to be designated.

I also present transcript of proceedings in the circuit court of Clinton county, Illinois, in a foreclosure of a mortgage by Edwin Beecher for the use of J. & J. Slevin against said L. J. S. Turney; said mortgage is dated July 30th, 1853, executed by L. J. S. Turney to Edwin Beecher, upon the E. ½ of sec. 36, T. 1 S., R. 7 E., also outlot No. 7, in Turney's Second Addition to the town of Fairfield, county of Wayne, Illinois, to secure the payment of one note, dated July 30, 1853, payable, on or before the 1st day of March next, to said Edwin Beecher or order, for the sum of $337.00, money loaned, with interest from date, at rate of ten per cent. per annum, and that by subsequent proceedings the title passed to said J. & J. Slevin. Said copy of proceedings is marked "Exhibit D."

I also present master's deeds to said Slevins, which I ask to have marked Exhibits E & F.

128 I also present a tax deed from A. Campbell, sheriff of Wayne Co., Ills., to John Slevin, one of the parties to this suit, dated June 10, 1862, on the E. ½ — 36, T. 1 S., R. 7 E., and N. W. ¼ N. W.

¼ sec. 6, — 2 S., R. 8 E., for consideration of $20.82, and marked "Exhibit G."

I also present tax receipts showing payment of taxes upon the aforesaid lands by said Slevins, parties herein, for the years mentioned in said receipts, being for the years 1862, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878; said receipts marked Exhibit H.

I also present a statement taken from the books of said company (J. & J. S. & Co.) showing dates and amounts paid out by said company for costs and taxes of said lands and foreclosure, marked "Exhibit I."

I also present a statement from the books of said company giving dates and amounts of moneys received on account of sales by said company of any parts of the above lands, marked "Exhibit J."

Upon a full and carefull examination of the books of said company I fail to find any other credits, either on account of sales
129 or rents received for use of said lands or any portion thereof, and I am justified in saying there are none, except I find a credit April 9, 1879, of $17.10 for rent for using a portion of the ground.

ARCH. MERRIELEES.

Complainants by R. D. Adams, their solicitor, object to testimony of Archibald Merrielees.

Subscribed and sworn to before me this 18th day of May, A. D. 1880.

J. A. JONES,
M. C. U. S. C. C., S. D. Ills.

During the pendency of this suit and during the year 1879 the N. W. ¼ of N. W. ¼ of sec. 6 was sold by trustees of Slevins for $800.00.

ARCH. MERRIELEES.

Subscribed and sworn to before me this 18th day of May.

J. A. JONES,
M. C. U. S. C. C., S. D. Ills.

(Endorsed:) Filed May 18th, 1880. J. A. Jones, clerk.

130 "EXHIBIT A."

Exhibit "A" to Deposition of Arch. Merrielees.

This deed, made this 21st day of November, A. D. 1853, between Leander Jay S. Turney, of the county of Wayne and State of Illinois, of the first part, and James Slevin and John Slevin, partners trading under the style of J. & J. Slevin, of the city of Cincinnati and State of Ohio, of the second part, witnesseth:

That the said party of the first part, in consideration of the sum

of two thousand dollars to him in hand paid by the said second parties, has granted, bargained, and sold, and does hereby convey, unto the said second parties, their heirs and assigns, the following-described tracts of land, situate in said Wayne county and State of Illinois, viz: The east half of section thirty-six, in township one south, of range seven east, and the northwest quarter of northwest quarter of section six, in township two south, of range eight east; to have and to hold said conveyed premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns forever.

The condition, however, of the foregoing conveyance is such that whereas the said Turney has this day executed to said second
131 parties his promissory note for the sum of two thousand dollars, payable two years after the date thereof, now, if said Turney shall pay off said note at maturity, then this conveyance to be void; otherwise to remain in full force and virtue.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

LE. JAY S. TURNEY. [SEAL.]

(Endorsed:) Filed 21st Nov., 1853, and recorded in Mortgage Book "A," page 5. J. G. Barkley, cl'k & *ex O.* recorder of Wayne Co., Ills.

STATE OF ILLINOIS, }
Wayne County. }

This day personally appeared before the undersigned, clerk of the circuit court in and for said county, Leander Jay S. Turney, whose name appears to the foregoing mortgage and who is personally known to me to be the real person who executed the same, and acknowledged the execution thereof to be this [his] act and deed for the uses and purposes therein mentioned.

Given under my hand and the seal of said court, at Fair-
[SEAL.] field, this 21st day of Nov., 1853.

J. G. BARKLEY, *Cl'k.*

132 "EXHIBIT E."

Exhibit "E" to Dep's'n of Arch. Merrielees.

Whereas at the May term of the circuit court of the county of Clinton, in the State of Illinois, in the year A. D. 1856, the following orders and decree was [were] made by said court in the following cause, to wit:

"JAMES & JOHN SLEVIN }
vs. } Bill to Foreclose Mortgage.
L. JAY S. TURNEY. }

Change of venue from Wayne county.

[2-dollar int. revenue stamp. J. G. B. 21st July, 1863. 2-dollar int. revenue stamp.]

[J. G. B. 21st July, 1863. 1-dollar int. revenue stamp.]

And now, at this time, comes the complainants, by Haynie &

Beecher, their solicitors, and the defendant having filed his answer to the complainants' bill within the rule taken against him on a former day of this term, and this cause came [coming] on for hearing upon bill and answer, and the court having examined the complainants' bill, as well as the answer of the defendant, and after hearing arguments of counsel and being sufficiently advised in the premises, it is ordered by the court that this cause, together with the mortgage, be referred to the master in chancery of this court for the computation of the amount of principal and interest due; and the master
133 having so computed to the court that there is due upon said mortgage as principal the sum of two thousand dollars and for interest the sum of sixty dollars, making together the sum of two thousand and sixty dollars, it is therefore ordered and decreed by the court that the said defendant pay or cause to be paid to the said complainants, on or before the first day of the next term of this court, the said sum of two thousand and sixty dollars, and in default of such payment the said defendant and all persons claiming by, through, or under him be forever barred and foreclosed of and from all equity of redemption in the premises hereinafter described, and that the mortgaged premises described as follows, to wit: The east half of section thirty-six, in township one south, of range seven east, and the northwest quarter of the northwest quarter of section No. six, township two south, of range eight east, all in said county of Wayne and in mortgage, be sold to the highest and best bidder for cash by the master in chancery in and for the county of
134 Wayne and State of Illinois, who is hereby appointed a commissioner for that purpose, the said master first giving six weeks' notice of the time, terms, and place of sale in some newspaper nearest the premises and by posting up written advertisements of the same in four of the most public places in said county of Wayne, and, upon such sale being made, to pay, first, the costs of this proceeding and the costs of such sale, and then pay to the said complainants the said sum of two thousand and sixty dollars, and the balance, if any, bring into court to be subject to its disposition.

And it is further ordered and decreed by the court that the said master in chancery of said county of Wayne, upon such sale being made, execute to the purchaser or purchasers a certificate of purchase of the premises sold, and that he make report of his proceedings herein, &c."

And whereas also, at the August term of the aforesaid court, in the year 1860, the following orders and decree was [were] made by said court in the said last aforesaid mentioned cause, to wit:

And now, at this time, to wit, August 17th, comes the said
135 complainant, by Underwood, his solicitor, and the said defendant in person, and the said defendant moves the court to set aside the sale of the premises in the decree of foreclosure made and entered at the May term of this court, A. D. 1856, made by the master in chancery of the county of Wayne, in the State of Illinois; and after the argument of counsel and examination of exhibits and proofs, the court being sufficiently advised in the premises, the mo-

tion is allowed by the court. It is therefore ordered by the court that the sale of the premises described in the decree of foreclosure in the above-entitled cause, as made and entered at this May term of this court, A. D. 1856, be set aside, and that J. G. Barkley, master in chancery of the county of Wayne and State of Illinois, resell the premises described in the said decree of foreclosure, and that he have the premises described in said decree advertised, as provided in said decree, by giving six weeks' notice of the time, terms, and place of sale in some newspaper nearest the land and by posting up written or printed notices of the said sale in four of the most public
136 places in the said county of Wayne, and, upon such being made according to the provisions of said decree, that he report the same to the next term of this court, and that this cause be continued, &c.

And whereas also, on the 5th day of April, 1862, I, Joseph G. Barkley, the master in chancery in and for said Wayne county, in the State of Illinois, appointed as aforesaid in the three foregoing causes, after having — six weeks' notice of the time, place, and terms of said sale in the "Prairie Pioneer," a public newspaper published at Fairfield, in said Wayne county, Illinois, and also posting up four notices thereof in four of the most public places in said Wayne county, proceeded, at the door of the court-house, in Fairfield, in said Wayne county, to sell said mortgaged premises to the highest bidder for cash, and at said sale Charles A. Beecher bid the several amounts on the said several tracts of land mentioned, viz: Five hundred and twenty-five dollars for the southwest fourth of the southeast quarter of section No. thirty-six (S. W. S. E., 36); five hundred and twenty-five dollars for southeast quarter of the southeast quarter of section thirty-six (S. E. S. E., 36); five hundred
137 and twelve dollars for the northwest fourth of the southeast quarter of section thirty-six (N. W. S. E., 36); five hundred dollars for the southwest fourth of the northeast quarter of section thirty-six (S. W. N. E., 36); five hundred dollars for the southeast fourth of the northeast quarter of section thirty-six (S. E. N. E., 36); four hundred and thirty-eight dollars for the northeast fourth of the northeast quarter of section thirty-six (N. E. N. E., 36), and four hundred and thirty-eight dollars for the northwest fourth of the northeast quarter of section thirty-six (N. W. N. E., 36), all in township one south, of range seven east, and situate in said Wayne county, Illinois; while [which] being the highest and best bid offered for the said several tracts of land, the same was struck off to him at and for those prices, and the term of fifteen months having expired since the sale of said land and the same remaining unredeemed, and the said Charles A. Beecher having duly assigned his certificate of purchase to James and John Slevin:

Now, therefore, know all men by these presents that I, Joseph G. Barkley, master in chancery of Wayne county, Illinois, appointed as aforesaid, in consideration of the premises and in the further consideration of the sum of thirty-nine hundred and fifty dol-
138 lars to me paid, have granted, bargained, and sold, and do hereby convey unto the said James and John Slevin the said

several tracts of land, being the east half of section No. thirty-six, in township one south, of range seven east, situate in said Wayne county, Illinois; to have and to hold said tract of land, with the appurtenances, unto them, the said James & John Slevin, assignees as aforesaid, and to their heirs and assigns forever, as fully and in every respect as I, the said master in chancery as aforesaid, may, can, or ought to convey the same.

In testimony whereof I have hereunto set my hand and affixed my seal this 21st day of July, A. D. 1865.

JOSEPH G. BARKLEY, [SEAL.]
Master in Chancery of Wayne Co., Ills.

STATE OF ILLINOIS, }
Wayne County, } *ss:*

Before the undersigned, clerk of the circuit court in and for said county, personally appeared Joseph G. Barkley, master in chancery of said Wayne county, and whose name appears to the foregoing conveyance and who is known to me to be the real person who
139 executed the same, and acknowledged the same to be his act and deed for the purposes therein mentioned.

Given under my hand and the seal of said court, at
[SEAL.] Fairfield, this 21st of July, 1863.

R. B. SLOCUMBS, *Cl'k.*

(Endorsed:) Filed 22nd July, 1863, and recorded in Book P, page 330. R. B. Slocumbs, cl'k.

Whereas at the May term, 1856, of the circuit court of the county of Clinton *county*, in the State of Illinois, the following decree was made by said court, to wit:

EXHIBIT "F."

Exhibit "F" to Depos'n of Arch. Merriclees.

"J. & J. SLEVIN
vs.
L. JAY S. TURNEY. } Bill to Foreclose Mortgage.

Change of venue from Wayne county.

And now, at this time, come the complainants, by Haynie & Beecher, their solicitors, and the defendant having filed his answer to the complainants' bill within the — taken against him on a former day of this term, and this cause came [coming] on for hearing upon bill and answer, and the court having examined the complain-
140 ants' bill, as well as the answer of the said defendant, and after hearing the argument of counsel and being sufficiently advised in the premises—

It is ordered by the court that this cause, together with the mortgage, be referred to the master in chancery of this court for the computation of the amount of principal and interest due, and the master,

having so computed, reports to the court that there is due upon said mortgage as principal the sum of two thousand dollars and for interest the sum of sixty dollars, making together the sum of two thousand and sixty dollars.

It is therefore ordered and decreed by the court that the said defendant pay or cause to be paid to the said complainants on or before the first day of the next term of this court the said sum of two thousand and sixty dollars, and in default of such payment the said defendant and all persons claiming by, through or under him be forever barred and foreclosed of and from all equity of redemption in the premises hereinafter described, and that the mortgaged premises described as follows, to wit: The east half of section number thirty-six, in township one south, of range seven east,
141 and the northwest quarter of the northwest quarter of section No. six, township two south, range eight east, all in said county of Wayne and in mortgage, be sold to the highest and best bidder, for cash, by the master in chancery in and for the county of Wayne and State of Illinois, who is hereby appointed a commissioner for that purpose, the said master first giving six weeks' notice of the time, terms, and place of sale in some newspaper nearest the premises and by posting up written advertisements of the same in four of the most public places in said county of Wayne, and upon such sale being made to pay, first, the costs of this proceeding and the costs of such sale, and then pay to the said complainants the said sum of two thousand and sixty dollars, and the balance, if any, bring into court, to be subject to its disposition; and it is further ordered and decreed by the court that the said master in chancery of said county of Wayne, upon such sale being made, execute to the purchaser or purchasers thereof a certificate of purchase of the premises sold, and that he make report of his proceedings herein, &c."

And whereas, also, at the August term of the circuit court
142 aforesaid, in the year 1860, the following order was made by said court in the aforesaid cause, to wit:

"J. & J. SLEVIN
vs.
L. JAY S. TURNEY. } Bill to Foreclose Mortgage.

And now, at — time, to wit, August 17th, comes the said complainants, by Underwood, their solicitors, and the said defendant in person, and the said defendant moved the court to set aside the sale of the premises in the decree of foreclosure made and entered at the May term of this court, A. D. 1856, made by said master in chancery of the county of Wayne, in the State of Illinois, and, after argument of counsel and examination of exhibits and proofs, the court being sufficiently advised in the premises, the motion is allowed by the court. It is therefore ordered by the court that the sale of the premises described in the decree of foreclosure in the above-entitled cause, as made and entered at the May term of this court, A. D. 1856, be set aside, and that J. G. Barkley, master in chancery of the county

of Wayne and State of Illinois, resell the premises described in said decree of foreclosure, and that he have the premises described
143 in said decree advertised, as provided in said decree, by giving six weeks' notice of the time, terms, and place of sale in some newspaper nearest the land and by posting up written or printed notices of the said sale in four of the most public places in said county of Wayne, and, upon such sale being made according to the provisions of said decree, that he report the same to the next term of this court, and that this cause be continued, &c."

And whereas, I, Joseph G. Barkley, the master in chancery aforesaid, after giving due and legal notice of the time, terms, and place of said sale, as required by said decree, proceeded, on the 10th day of February, 1862, at the door of the court-house, in Fairfield, in said Wayne county, to sell said lands at public sale, and at said sale Charles A. Beecher bid the sum of six hundred dollars for the said northwest quarter of the northwest quarter of section six, in township two south, of range eight east, in said Wayne county, Illinois, which being the highest and best bid for said tract of land the same was struck off and sold to him at and for that price, and the
144 term of fifteen months having expired since the sale of said lands and the same remaining unredeemed, and the said Charles A. Beecher having assigned his certificate of purchase to James and John Slevin:

Now, therefore, know all men by these presents that I, Joseph G. Barkley, the master in chancery of Wayne county, Illinois, as aforesaid, in consideration of the premises and in the further consideration of the sum of six hundred dollars paid by the said C. A. Beecher, have granted, bargained, and sold, and do hereby convey unto the said James and John Slevin, assignees of the said C. A. Beecher as aforesaid, and to their heirs and *and* assigns the said northwest fourth of the northwest quarter of section six, in township two south, of range eight east, situate in said Wayne county, Illinois; to have and to hold the same, together with the appurtenances, unto the said James and John Slevin, assignees as aforesaid, and to their heirs and assigns forever, as fully and in every respect as I, the said master in chancery, may, can, or ought to convey the same.

In testimony whereof I have hereto set my hand and seal
145 as such master in chancery, at Fairfield, this 21st day of July, A. D. 1853.

J. G. BARKLEY, [SEAL.]
Master in Chancery at Wayne County.

[J. G. B. 21st July, 1863. 1-dollar int. revenue stamp.]

STATE OF ILLINOIS, }
Wayne County. }

This day personally appeared before me, the undersigned clerk of the circuit court in and for said county, J. G. Barkley, master in chancery of said county, and whose signature appears to the foregoing conveyance, and then and there acknowledged the same to be his acts and deed for the uses and purposes therein mentioned.

[SEAL.] Given under my hand and the seal of said court, at Fairfield, this 21st day of July, 1863.

R. B. SLOCUMBS, *Clk.*

(Endorsed:) Filed 21 July, 1863, and recorded in Book P, page 327. R. B. Slocumbs, clerk.

146 "EXHIBIT G."

Exhibit "G" to Depos'n of Arch. Merrielees.

Sheriff's tax deed.

Know all men by these presents that whereas, at the October term, A. D. 1859, of the county court of Wayne county, State of Illinois, a judgment was obtained in said court in favor of the State of Illinois against E. ½ sec. 36, T. 1 S., R. 7 E., & N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E., for the sum of twenty dollars and seventy-two cents, being the amount of taxes, interest, and costs assessed upon said tracts of land for the year 1858;

And whereas, on the seventeenth day of October, 1859, H. A. Organ, sheriff of the county aforesaid, by virtue of a precept issued out of the county court of the county aforesaid, dated the 17 day of October, A. D. 1859, and to me directed, did expose to public sale, at the door of the court-house, in the county aforesaid, in conformity with all the requisitions of the statute in such cases made and provided, the tract of land above described for the satisfaction of the judgment so rendered as aforesaid;

And whereas, at the time and place aforesaid, Charles Wood, of the county of Wayne and State of Illinois, having offered
147 to pay the aforesaid sum of twenty dollars and seventy-two cents, which was the least quantity bid for, the said tracts were stricken off to him at the price aforesaid, and the said Charles Wood having duly assigned his certificate of purchase to John Slevin by endorsement thereon under his hand, as appears from said certificate, to me this day exhibited, and the said John Slevin having made affidavit in conformity with the requirements of the statute in such cases made and provided:

Now, whereas [therefore], I, A. Campbell, sheriff as aforesaid, for and in consideration of the said sum of twenty dollars and seventy-two cents to H. A. Organ in hand paid by the said Charles Wood at the time of the aforesaid sale, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said John Slevin, his heirs and assigns, the E. ½ sec. 36, T. 1 S., R. 7 E., and N. W. ¼ N. W. ¼ sec. 6, T. 2 S., R. 8 E.; to have and to hold unto him, the said John Slevin, his heirs and assigns forever, subject, however, to all
148 the rights of redemption provided by law.

In witness whereof I, A. Campbell, sheriff as aforesaid, by virtue of the authority as aforesaid, have hereunto subscribed my name and affixed my seal this 10 day of June, A. D. 1862.

A. CAMPBELL, [SEAL.]

Sheriff of Wayne County, Illinois.

STATE OF ILLINOIS, } ss:
Wayne County, }

Be it remembered that on this 10 day of June, A. D. 1862, [SEAL.] before the undersigned, clerk of the circuit court in and for the county of Wayne and State of Illinois, came Alexander Campbell, personally known to me to be the real person whose name, as sheriff of said county, is subscribed to the foregoing deed, and who executed the same, and he acknowledged that as such sheriff he signed, sealed, and delivered said deed freely and voluntarily for the uses and purposes therein mentioned.

Given under my hand and the seal of said court, at my office, in Fairfield, in said Wayne county, date last above written.

149 R. B. SLOCUMBS, *Clerk,*
By R. P. HANNA, *D'p't.*

(Endorsed:) Filed 19 July, 1862, and recorded in Book N, page 542. R. B. Slocumbs, cl'k.

"EXHIBIT H."

Exhibits Marked "H" to Depos'n of Arch. Merrielees.

STATE OF ILLINOIS, } ss:
Wayne County, }

Redemption Certificate.

OFFICE OF THE CLERK OF THE
COUNTY COURT OF WAYNE COUNTY.

I, John Morris, clerk of the county court of Wayne county, hereby certify that Jas. L. Slevin, attorney, has deposited in this office twenty-two & sixty-five 100 [one hundredths] dollars for the redemption of the northwest northwest of section six, town. two south, range eight east, which was sold to A. B. Rider for the taxes and costs thereon, due and unpaid for the year 1875, on the tenth day of June, A. D. 1876, by the county collector of said county.

	Amount of sale	$18 13
	25 per cent	4 53
[SEAL.]	Subsequent taxes	
	Ten per cent. interest thereon	
	Advertising fee	
150	Cost	25
		$22 91

Given under my hand and the seal of said court this twelfth day of December, A. D. 1876.

JOHN MORRIS,
Clerk of the County Court.

Treasurer's Receipt.

STATE OF ILLINOIS, } ss:
Wayne County, }

OFFICE OF THE COUNTY COLLECTOR, *June* 29, 1876.

Received of James L. Slevin ninety-four & $\frac{7}{100}$ dollars in full for the redemption of the following-described real estate, situate in said county and described as follows, to wit: N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E., and S. E. S. E., sec. 36, town. 1 S., R. 7 E.; which real estate was on the 9th day of June, 1876, forfeited to the State for the taxes and costs due and unpaid thereon.

Taxes	$83 56
Printer's fee	60
Costs	1 50
Ten per cent. added	8 41
Total	$94 07

A. M. CABLE,
County Collector.

[On margin:] John Morris, county clerk.

151 STATE OF ILLINOIS, *Wayne County:*

COLLECTOR'S OFFICE, FAIRFIELD, *May* 21, 1875.

Received of J. & J. Slevin, per B., G. & S., one hundred ten and $\frac{76}{100}$ dollars, the State, county, town, school, road, railroad interest, dog, and back taxes for the year 1874 on the following real & personal estate:

Subdivision of sections.	Section.	Township.	Range.	Acres.	Value.	Tax.
N. E.	36	1 S.	7 E.	160	2,571	50 64
N. $\frac{1}{2}$ S. E.	36	"	"	80	1,285	25 77
S. E. S. E.	36	"	"	40	857	16 89
N. W. N. W.	6	2 S.	8 E.	40	598	16 18
Costs						1 28
Total tax						$110 76

A. M. CABLE, *Collector.*

152 TREASURER'S OFFICE, FAIRFIELD,
WAYNE COUNTY, ILLINOIS.

Received of J. & J. Slevin, p'r B., G. & S., May 4th, 1874, ninety-two and $\frac{41}{100}$ dollars, the State, county, town, school, road, railroad, county, special, dog, and back tax for the year 1873 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E.	36	1 S.	7 E.	160	2,246	$37 69
N. ½ S. E.	36	"	"	80	1,404	22 60
S. E. S. E.	36	"	"	40	749	11 62
N. W. N. W.	6	2 S.	8 E.	40	655	14 70
Out-lot No. 7, Turney's 2d Add., Fairfield					212	4 75
Costs						1 05
						92 41

$—— personal property.

A. M. CABLE, *Collector.*

(Endorsed:) July 15th, 1875. Refunded $\frac{7}{36}$ State tax—three & $\frac{89}{100}$ dollars. A. M. Cable, Co. tre-s. Van.

153 LAMARD TOWNSHIP, WAYNE COUNTY, ILLINOIS.

Received of J. & J. Slevin per B., G. & S., — dollars, the State, county, town, school, road, railroad, county, special, dog, and back tax for the year 1872 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	1,317	$42 65
S. E. qr.	36	"	"	160	1,537	49 27
N. W. N. W.	6	2 S.	8 E.	40	642	24 95
Out-lot No. 7, Turney Second Add., paid						$116 87

—— personal property.

JOHN A. MOFFITT, *Collector.*

154 TREASURER'S OFFICE, WAYNE COUNTY, ILLINOIS.

Received of J. & J. Slevin, p'r Beecher, George & Sailor, ($132.40) one hundred & thirty-two and $\frac{40}{100}$ dollars, the State, county, town, school, road, railroad, county, special, dog, and back tax for the year 1871 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	1,536	51 34
S. E. "	36	1 S.	7 E.	160	1,792	59 90
N. W. N. W. qr.	6	2 S.	8 E.	40	640	19 87
Out-lot No. 7, Turney's 2nd Ad., Fairfield					34	1 29
						132 40

JOHN A. MOFFITT, *Treasurer.*

155 TREASURER'S OFFICE, WAYNE COUNTY, ILLINOIS.

Received of J. — J. Slevin, p'r Beecher, George & Sailor, one hundred and fourteen and $\frac{11}{100}$ dollars, the State, county, school, town, road, railroad, and dog tax for the year 1870 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E.	36	1 S.	7 E.	160	1,430	52 59
S. E.	36	"	"	160	1,669	61 52
						$114 11

Duplicate.

JOHN A. MOFFITT, *Treasurer.*

156 TREASURER'S OFFICE, WAYNE COUNTY, ILLINOIS.

Received of J. — J. Slevin, p'r Beecher, George & Sailor, twenty and $\frac{98}{100}$ dollars, the State, county, school, town, road, railroad, and dog tax for the year 1870 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. W. N. W.	6	2 S.	8 E.	40	596	$20 98
Out-lot No. 7, Turney's 2nd Addition to Fairfield					42	1 86
						22 84

Duplicate.

JOHN A. MOFFITT, *Treasurer.*

157 OFFICE OF COLLECTOR OF WAYNE COUNTY, ILLINOIS,
FAIRFIELD, *April 20th*, 1870.

Received of J. & J. Slevin, p'r Beecher, George & Sailor, one hundred and one and $\frac{70}{100}$ dollars, the State, county, school, town, road, railroad, and dog tax for the year 1869 on the following real estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	1,107	35 51
S. E. qr.	36	"	"	160	1,384	44 39
N. W. N. W. qr.	6	2 S.	8 E.	40	692	21 80
						$101 70

JOHN A. MOFFITT, *Collector.*

158 $5.55. OFFICE OF THE COLLECTOR OF WAYNE COUNTY,
FAIRFIELD, ILLS., *April 13th*, 1869.

Received of J. — J. & Slevin, p'r B., G. & S., five and $\frac{55}{100}$ dollars, the State, county, school, town, and road tax for the year 1868 on the following real and personal estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. W. ¼ N. W. qr.	6	2 S.	8 E.	40	238	5 55
Out-lot No. 7, Turney 2nd Addition to Fairfield						2 05
Total						7 60

J. C. ALEXANDER, *Collector.*

COLLECTOR'S OFFICE,
FAIRFIELD, WAYNE CO., ILLS., —— —, 1869.

Received of J. & J. Slevin, p'r B., G. & S., twenty-seven $\frac{26}{100}$ dollars, the State, county, school, town, and road tax for the year 1868 on the following real and personal estate:

Subdivision of section.	Section.	Town.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	480	13 63
S. E. qr.	36	"	"	160	480	13 63

ELI BROCK, *Collector.*

159 $4.85. COLLECTOR'S OFFICE,
FAIRFIELD, WAYNE CO., ILLINOIS, *May 12th*, 1868.

Received of J. & J. Slevin, by Beecher, George & Sailor, four and $\frac{85}{100}$ dollars, the State, county, school, town, and road tax for the year 1867 on the following real estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. W. ¼ N. W. qr.	6	2 S.	8 E.	40	242	4 85
Out-lot No. 7, Turney's 2nd Addition to Fairfield						1 95

J. C. ALEXANDER, *Collector.*

STATE OF ILLINOIS, *Wayne County:*

Received of J. & J. Slevin, p'r Beecher, George & Sailor, ten $\frac{32}{100}$ dollars, the State, county, school, town, and road tax for the year 1867 on the following real and personal estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	3 20	5 64
S. E. qr.	"	"	"	160	3 20	4 68
						$10 32

Personal property, $—.

JAMES BRANCH,
Collector Lamard Township.

160 STATE OF ILLINOIS, *Wayne County:*

Received of J. & J. Slevin, p'r C. A. Beecher, — $\frac{00}{100}$ dollars, the State, county, school, town, and road tax for the year 1866 on the following real and personal estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. W. ¼ N. W. qr.	6	2 S.	8 E.	40	200	3 95

T. J. PRICKETT,
Collector of Barnhill Township.

STATE OF ILLINOIS, *Wayne County:*

Received of J. — J. Slevin, p'r C. A. Beecher, $26\frac{40}{100}$ dollars, the State, county, town, and road tax for the year 1866 on the following real and personal estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. E. qr.	36	1 S.	7 E.	160	4 80	13 20
S. E. "	"	"	"	160	4 80	13 20
						26 40

I. T. BROCK,
Collector of Lamard Township.

161 STATE OF ILLINOIS, *Wayne County:*

Received of J. & J. Slevin, p'r C. A. Beecher, 26.60 dollars, the State, county, school, town, and road tax for the year 1865 on the following real and personal estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. W. ¼ N. W.	6	T. 2 S.	8 E.	40	200	4 24
N. E.	36	T. 1 S.	7 E.	160	480	11 18
S. E.	"	"	"	"	480	11 18
						$26 60

J. C. ALEXANDER,
Collector of Wayne Co.

Received of J. & J. Slevin, by C. A. Beecher, three dollars and twenty cents in full of road tax on the following real estate for year 1865:

E. ½ sec. 36, T. 1 S., R. 7 E., Wayne Co., Illinois.

WM. WHITACER.

162 STATE OF ILLINOIS, *Wayne County:*

Received of J. & J. Slevin, by C. A. Beecher, three $\frac{88}{100}$ dollars, the State, county, school, town, and road tax for the year 1864 on the following real and personal estate:

Subdivision of section.	Section.	Township.	Range.	Acres.	Value.	Amount.
N. W. ¼ N. W. ¼	Sec. 6	T. 2 S.	R. 8 E.	------	------	$3 88

JAMES S. WILSON,
Collector of Town. 2 S., R. 8 E.

$36.16. COLLECTOR'S OFFICE,
WAYNE COUNTY, ILLS., *Feb. 6th*, 1865.

Received of J. & J. Slevin, by C. A. Beecher, thirty-six $\frac{16}{100}$ dollars for State, county, school, road, town, and back tax for the year 1864 on the following-described property:

Personal property.	Sec.	T.	R.	Acres.	Valuation.	State & county tax.	District school tax.	Town tax.	Road tax.	Back taxes.	Total.
N. E. ¼	36	1 S.	7 E.	160	800	------	------	----	----	----	18 08
S. E. ¼	"	1 S.	7 E.	160	800	------	------	----	----	----	18 08
											36 16

I. T. BROCK,
Collector of Wayne County, Ills, T. 1 S., R. 7 E.

163 Received of J. & J. Slevin, by E. & C. A. Beecher, $14.20 in full of the tax for 1862 on the following real estate:
E. ½ sec. 36, T. 1 S., R. 7 E.
Dec. 24, 1862.

JAMES BRANCH.

164 LAMARD TOWNSHIP, WAYNE COUNTY, ILLINOIS, *March 14th*, 1879.

Received of August Trum, att'y, per G. J. George, sixty-seven dollars and twenty-three cents in full for State, county, back, and special taxes for the year 1878 on the following-described real and personal estate in Lamard township, Wayne Co., Ill., to wit:

Part of section.	Section or lot.	Town. or block.	Range.	Acres.	Equalized value by State board.	State tax.		County tax.		Town tax.		Road and bridge tax.		Co. bond tax.		District school tax.		Road tax.		Town bond tax.		Back tax, int., and costs forfeited prior to July 1, 1879.		Village.		Total tax.	
				Acres.	*Dollars.*	*Dolls*	*Cts.*	*Dolls.*	*Cts*	*Dolls*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls*	*Cts.*
N. E. qr.....	36	1 S.	7	160	1,562	5	15	8	90	1	87	1	41	8	90	3	75	2	34	8	28	....	.....	.....	....	40	60
N. ½ S. E.....	"	"	"	80	683	2	25	3	89		82		61	3	89	1	64	1	02	3	62	.....	.....	.....	....	17	74
S. E. S. E.....	"	"	"	40	342	1	13	1	95		41		31	1	95		82		51	1	81	.....	.....	.....	....	8	89
																										$67	23

J. M. SCOTT, *Town Collector.*

165 FAIRFIELD, WAYNE COUNTY, ILLINOIS, *April 9th*, 1879.

Received of Rider Bros., for J. & J. Slevin, seventeen dollars and ten cents in full for State, county, back, and special taxes for the year 1878 on the following-described real and personal estate in Barnhill township, Wayne Co., to wit:

Part of section.	Section or lot.	Town. or block.	Range.	Acres.	Equalized value by State board.	State tax.		County tax.		Town tax.		Road and bridge tax.		Co. bond tax.		District school tax.		Road tax.		Town bond tax.		Back tax, int., and costs forfeited prior to July 1, 1879.		Village.		Total tax.	
				Acres.	*Dollars*	*Dolls*	*Cts.*	*Dolls*	*Cts.*	*Dolls*	*Cts.*	*Dolls*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls*	*Cts.*
N. W. N. W.....	6	2 S.	8	40	440	1	47	2	53		71		31	2	53	7	15		18	.....	.....	.....	.....	2	22	17	10

JOHN MORRIS, *County Collector.*

166

FAIRFIELD, WAYNE COUNTY, ILLINOIS, *April 8th*, 1878.

Received of James L. Slevin, attorney, sixty-seven dollars and 58 cents in full for State, county, back, and special taxes for the year 1877 on the following-described real & personal estate in —— township, Wayne Co., Illinois, to wit:

Part of section.	Section or lot.	Town. or block.	Range.	Acres.	Equalized value by State board.	State tax.		County tax.		Town tax.		Road and bridge tax.		Co. bond tax.		District school tax.		Road tax.		Town bond tax.		Back tax, int., and costs forfeited prior to July 1, 1879.		Village.		Total tax.	
				Acres.	*Dollars.*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*
N. E.	36	1 S.	7 E.	160	1,750	6	23	7	44	1	90	1	04	9	52	2	77	3	24	9	17	.....	.....	.....	.....	41	31
N. ½ S. E.	36	"	"	80	692	2	49	2	98		76		42	3	81	1	11	1	80	3	67	.....	.....	.....	.....	17	04
S. E. S. E.	36	"	"	40	346	1	25	1	49		38		21	1	90		55	1	62	1	83	.....	.....	.....	.....	9	28
																										67	58

JOHN MORRIS, *Co. Collector.*

167

FAIRFIELD, WAYNE COUNTY, ILLINOIS, *April 9th*, 1878.

Received of James Slevin, attorney, sixteen dollars and 27 cents in full for State, county, back, and special taxes for the year 1877 on the following-described real & personal estate in Barnhill township, Wayne Co., Ill., to wit:

Part of section.	Section or lot.	Town. or block.	Range.	Acres.	Equalized value by State board.	State tax.		County tax.		Town tax.		Road and bridge tax.		Co. bond tax.		District school tax.		Road tax.		Dog tax.		Back tax, int. and costs forfeited prior to July 1, 1879.		Village.		Total tax.	
				Acres.	*Dollars.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts*	*Dolls.*	*Cts*	*Dolls.*	*Cts.*	*Dolls*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*	*Dolls*	*Cts.*
N. W. N. W.	6	2 S.	8 E.	40	476	1	71	2	05		71	.....	.....	2	60	6	80	.....	.....	.....	.....	.....	.....	2	38	16	27

JOHN MORRIS, *Co. Collector.*

168 STATE OF ILLINOIS, *Wayne County:*

TREASURER'S OFFICE, *April* 18, 1877.

Received of J. & J. Slevin eighty-six $\frac{66}{100}$ dollars, the State, county, town, corporation, school, road, railroad, interest, dog, special, and back taxes for the year 1876 on the following real & personal estate:

Subdivision of sections.	Section.	Township.	Range.	Acres.	Value.	Tax.
N. E.	36	1 S.	7 E.	160	1,500	34 15
N. ½ S. E.	"	"	"	80	954	21 57
S. E. "	"	"	"	40	750	17 08
N. W. N. W.	6	2 S.	8 E.	40	473	13 86
Total tax						$86 66

A. M. CABLE,
County Collector.

169

Tax for—		On—	Tax.	On—	Tax.	On—	Tax.	Amount.
M'ch 14, '79	'79	N. W. N. W. 6, T. 2 S., 8 E.	.....	N. E. 36, N. E. S. E. 36, N. ½ S. E. 36, 1 S., 8 E.	.....	Lot No. 7		
Apr. 9, '79	'78	" "	17 10	" "	67 23	.....	.....	84 32
April 8 & 9, '78	'77	" "	16 27	" "	67 58	.....	.....	83 85
" 18, '77	'76	" "	13 86	" "	72 80	.....	.....	86 66
June 29, '76	.....	.....	94 07					
Dec. 12, '76	'75	" "	22 91	" "	.....	.....	.....	116 98
May 21, '75	'74	" "	16 50	" "	94 26	.....	.....	110 76
" 4, '74	'73	" "	14 91	" "	76 24	"	1 26	92 41
" 1, '73	'72	" "	24 95	E. ½ 36	91 92	"	.....	116 87
" 1, '72	'71	" "	19 87	"	111 24	"	1 29	132 40
" 1, '71	'70	" "	20 98	"	114 11	"	1 86	136 95
Apr. 20, '70	'69	" "	21 80	"	79 90	.....	.....	101 70
" 13, '69	'68	" "	5 55	"	27 26	"	2 05	34 86
May 12, '68	'67	" "	4 85	"	10 32	"	1 95	17 12
" 1, '67	'66	" "	3 95	"	26 40	.....	.....	30 35
					3 20			
" 1, '66	'65	" "	4 24	"	22 36	.....	.....	29 80
Feb'y 6, '65	'64	" "	3 88	"	36 16	.....	.....	40 04
	'63							
Dec. 24, '62	'62	.....	.....	"	14 20	.....	.....	14 20
	'61							
	'60							
	'59							
	'58							
	'57							
	'56							
	'55							
	'54							
	'53							
	'52	.....	194 52	.....	942 02	.....	8 41	1,144 95
			211 62		1,009 25			1,229 28

170

"Exhibit I."

Exhibit "I" to Depos'n of Arch. Merrielees.

Statement of certain amounts paid ac. Turney lands.

1862, Dec.	31.	C. A. Beecher				75 41
"	"	"				14 20
1864, May	25.	Injunction J. & J. S. *vs.* Turney, clerk & docket fee	7 50			
		Foreclosure, cl'k & docket fee, & master-in-chancery fee	51 75			
		C. W. Eldridge *vs.* Same, foreclosure, docket, & master — chancery fee	125 80			
		J. & J. S. *vs.* Same, cl'k, docket, & master-in-chancery fee	66 35			
						251 40
Dec.	31.	Taxes for 1858	19 10			
		1859	19 90			
		1860	31 30			
		1861	25 68			
		1862	17 70			
		1863	28 55			
		Tax title	48 45			
				190	68	
		Costs, fees, &c., Turney, p'd by E. & C. A. B.	58 05			
		Recording deed	5			
		Fee C. A. B.	250			
				313	05	
						503 73
1867, Mar.	4.	Cash taxes				32
						876 74

171

		Am't br't for	876 74
1870, Ap'l	27.	Taxes B., G., S.	104 20
1872, Ap'l	24.	" "	136 40
1873, Ap'l	26.	" "	123 63
1874, May	1.	" "	95
1875, May	18.	" "	116
1876, June	26.	" "	103 49
1877, March	29.	" "	89 66
1878, "	30.	" "	86 85

1879, Feb'y 26. Taxes B., G., S.	71	
		$1,802 97
March 4, 1862	32	
		$1,834 97

EXHIBIT "J."

Exhibit "J" to Deposition of Arch. Merrielees.

Received, Cinct., Nov. 11, 1873, of David W. Barkley four hundred dollars, payment in full for out-lot number seven (7), Turney's Second (2nd) Addition to the town of Fairfield, Illinois, for which we agree to make a good warranty deed.

$400. J. & J. SLEVIN.

172 David W. Barkley, Esq., Fairfield, Ill.

DEAR SIR: Above please find g-arantee for deed to out-lot No. 7, for which we rec'd from you $400. As soon — deed return from Europe we can send it to you and you can return us the above.

Resp. yours, J. & J. SLEVIN.

Sales Lands Turney.

1872, A'pl 23. Oliver Holmes, S. W. ¼, S. E. ¼, S. 36, T. 1, R. 7 E., 40 acres, cash	$1,600
1873, Nov. 12. David W. Barkley, out-lot # 7, Turney's 2nd Add. to town Fairfield, cash	400
	$2,000

173 In the Circuit Court of the United States for the Southern District of Illinois.

LEANDER J. S. TURNEY *et al.* *vs.* JAMES SLEVIN *et al.* } In Chancery.

Deposition of Chas. A. Beecher.

Testimony of Charles A. Beecher, taken before J. A. Jones, master in chancery of said court, by consent of parties, at Springfield, in said district, on the 9th day of August, 1881.

CHARLES A. BEECHER, being first duly sworn, deposes and says:

My name is Charles A. Beecher; age, 51 years past; residence, Cincinnati, Ohio; business, general solicitor Ohio and Mississippi railway. In 1854 I moved to Wayne county, Illinois, and that I considered my residence until 1872. I was practicing law in that place and doing the duties of a practicing attorney, and had considerable real estate business buying and selling lands. J. and J. Slevin, of Cincinnati, were among my client-. About 1865, I think,

several claims against L. J. S. Turney came into my hands
174 for collection, one in favor of J. and J. Slevin, one in favor — Charles W. Eldridge, and one in favor of Edwin Beecher, nd all secured by mortgage upon real estate or some of it men- ioned in these bills. Probably in 1856 I filed bills for foreclosure in Wayne county against L. J. S. Turney and probably his wife; all of which cases were sent to the circuit court of Clinton county on change of venue. I was personally acquainted with the plaintiffs and defendants and had charge of the collections of this business, either personally or employing some one to assist me.

I attended to these matters personally until 1867, when I formed the partnership as Beecher, George and Sailor. Since 1872, when I left the county, I have had nothing to do with their suits. Deeds were obtained from J. G. Barkley, special master in chancery, some time in 1863. Deeds were delivered to me for J. and J. Slevin and I had them placed on record.

From the time of recording the deeds in 1863 up to the time I left the county in 1872 there was no business going out of this
175 transaction, except the annual payment of taxes. When I find [first] became acquainted with this tract of land it was all under fence. It was — in 1854 by a very poor, frail slat fence. My recollection is there was a wheat crop on the place in 1857. Only a small portion of it — ever harvested, and that permitted to be destroyed by cattle breaking through the enclosure.

From that time forward there was no attempt made to repair or keep up the fence around what was known as the big field, or 320-acre tract. I think there was a portion of it—W. N. W. 6, 2, S. 8—under fence, but exactly how many acres I am unable to state—only a small part of it—nor how long that fence remained, but don't think it was in condition to protect crops at time deeds were received in 1863. Shortly after that they were all hauled away by parties other than Mr. Slevin.

During this time I had charge of the property. From 1863 to 1872 there was no attempt made to rent the property, and, from my knowledge of the situation of the property, I am satisfied it
176 could not have been rented for anything. No application was ever made to me for it. From 1863 to 1872 there were [was] no actual occupation beyond paper titles being on record, that I am aware of.

This land is very largely prairie. There is, however, two considerable patches of underbrush and small growth of timber. The only possession I ever had of the property was a [in] reclining [receiving] deed- from the commissioner and placing them of record. I have said I didn't think these lands had any rental value in the condition they were in from 1863 to 1872. I think I had the exclusive charge of Mr. Slevin's business in relation to this property from 1863 to the time I left the country.

Int. 1. Had you any authority from or did you, in point of fact, enter into possession of any of the premises described — the pleadings for J. and J. Slevin on account of the breach of the conditions of any of the mortgages in the pleadings described?

Ans. I did not enter into possession, and did not have any authority to do so.

177 Int. 2. You may state, in respect to any acts of ownership or assertion of title by you on behalf of J. and J. Slevin in the property above referred to, upon what, if any, claim or right in the premises you based such acts of ownership or assertion of title.

Ans. The only claim or [of] possession or right of control ever asserted by me in behalf of Messrs. J. and J. Slevin was by return of the deed made to them in 1863 by J. G. Barkley, special master. The only possession we ever took of it was by virtue of their deed; there was no physical possession. The people traveled over it and had about as much possession of it as Slevin. I mean by that it lay out in the commons and one of the principal roads of Fairfield is over their property.

Int. 3. Had you any knowledge or did you communicate to Messrs. J. and J. Slevin any want of power in the special master to execute the deeds?

Ans. I did not; never doubted the validity of the deeds until I heard of the proceedings here.

178 I negotiated for the purchase of the Eldridge and Beecher claim in behalf and for Mess. J. and J. Slevin. If any one from 1863 to 1872 had disputed the claim of J. and J. Slevin to their land I would have asserted it.

Close [cross] examination:

X Int. 1. Where was L. J. S. Turney from 1862 to 1870?

Ans. He was appointed by Mr. Lincoln secretary to Washington Territory in 1861, and did not stay there over two years, as I remember; do not know when he returned.

X Int. 2. Who had possession of these lands from 1863 to 1876?

Ans. From 1863 to 1872, when I left Wayne county, I was the agent to [of] Slevin to look after the lands and pay taxes on it. The only thing I did to their lands, as I remember, was to pay taxes on it. All of the lands, with the exception of perhaps a few acres in section 6, lay out in commons. There was no timber on[t] it worth protecting, and I have no recollection attempting to protect it from trespassers.

X Int. 3. What was the N. W. N. W. sec. 6 worth 2 yrs. ago, as compared with 40 Holmes bought?

179 Ans. I should think it was worth twice as much as the land Mr. Holmes purchased; the land Holmes got is much more valuable than the balance of the half section he did not purchase.

C. A. BEECHER.

Subscribed and sworn to before me this 9th August, 1881.

J. A. JONES, *M. C.*

180 In the Circuit Court United States, Southern District of Illinois.

L. J. S. TURNEY *et al.*
vs.
JAMES SLEVIN *et al.* } In Chancery.

Depositions of Gilbert J. George.

Testimony of G. J. George, witness on behalf of defendants.

G. J. GEORGE, being first duly sworn, says:

I am the same George whose testimony was taken before John S. Handley and on file on [in] this case.

Int. 1. Please state what you mean by possession in your answer to question 5 of your deposition, above referred to, in which you state J. and J. Slevin think C. A. Beecher, their agent in 1863—I mean possession as shown by the records in 1863—I mean the records of the deeds from the master in chancery to J. and J. Slevin, on the Wayne county records.

—. I was not the agent to rent the lands at any time. With the consent of Slevin I made a lease to Ryder, who was to pay the taxes on the part leased by him, which was a small part of N. W.
181 of N. W. of section 6. They had fenced it up prior to this.

X Int. 1. Did you ever submit to them—proposition to them for leasing balance of land?

Ans. I am not certain whether I wrote for Mr. Holmes or whether he wrote himself. I saw a letter come back from them saying they would not lease.

X Int. 2. Where is that letter now?

Ans. Am not sure; think Mr. Conkling has it.

X Int. 3. Where is that letter right now?

Ans. In hand of Mr. Conkling. Letter was written to Beecher, George and Sailor in February, 1877—reply.

G. J. GORGE.

Subscribed and sworn to before me this 9th August, 1881.

J. A. JONES, *M. C.*

R. P. Hanna, Esq., asks to have letter here referred to attached to their deposition and marked Exhibit A.

Exhibit "A" to Deposition of G. J. George.

CINCINNATI, *Feb.* 19, '77.

Beecher, George & Sailor.

182 DEAR SIR-: We are in receipt of a letter from Mr. Conkling of 16th in which he desires us to have you go or send to Carlyle and get cert. copy of all there is of record or on file in said court in these cases—Beecher, Eldridge, and Slevin; also of judge's minutes on his bar docket or in any connection with the case.

Same at [as] to Wayne county. Be particular to get all there is and any evidence of there [their] having been tampered with. Thus you have date of decree, and see if any page or paper are [is] missing from the record book. While examining a book of record in Iowa some months back I came across a page that was completely taken out. Any and all points will be of value in the case, and if you send see that it is some one who is sharp and will not miss any points to be collected.

Some time ago we had, through you, a small house erected on the Turney land and a tenant placed therein. Has he remained there since, and is not this enough to show clearly our possession?

Let us know; would rather not lease for 3 years, and if we
183 did on terms reported (Holmes to erect good plank fence all around farm on lease of rent) we would only do so subject to our right to take possession at any time, paying Holmes such part of the cost of the fence as the unexpired term of 3 years is to 3 years. Would he agree to this? The chances are we will not sell for some time. I received a letter from C. A. Beecher a few days ago; sent same to Mr. Conkling. Keep us posted.

Respectfully, J. & J. SLEVIN AND CO.

(Endorsed:) Filed August 9, 1881. J. R. Jones, clerk.

184 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the Circuit Court Thereof.

TURNEY and ADAMS } Original Bill.
vs.
SLEVIN *et al.* }

SLEVIN *et al.* } Cross-Bill.
vs.
TURNEY and ADAMS. }

Testimony of witness- taken before Hon. Bluford Wilson, special master in chancery, at Fairfield, Illinois, Apr. 10th and 11th, 1885, on behalf of Slevin *et al.*

Appearances: Hon. Wm. J. Conkling, for Slevin *et al.*; Hon. R. J. Hanna, for Turney and Adams.

Stenographer: T. J. Thompson.

Testimony of Thos. L. Cooper.

THOMAS L. COOPER, being first duly sworn, testifies, viz:

Q. Please state your name, age, and place of residence.

A. Thomas L. Cooper; reside in Fairfield; age, about fifty-three.

Q. Are you acquainted with the plaintiff- and defendants
185 in this suit or either of them, J. and J. R. Slevin and Leander J. S. Turney and Robley D. Adams?

A. I am acquainted with Adams, and was with Mr. Turney during his lifetime.

Q. Are you acquainted with what are known as the Slevin land-, formerly owned by Leander J. S. Turney, and lying near Fairfield?

A. Yes, sir; I think I do. I do not know that I know the boundary lines of them.

4. They are described as the east half of thirty-six, T. I S., R. 7 E., and the N. W. N. W., T. I S., R. 8 E., of sect. six, and forty acres in the southeast.

A. I know the land called the Slevin land, sold by Turney to Slevin.

5. For what length of time have you known them?

A. Ever since he sold them to Slevin.

6. Can you fix the year, probably?

A. I don't think that I can. I should think it was about fifty-five when the trade was made—some time before the war.

7. You have known them from about that time?

A. Yes, sir.

186 8. You may state the character of those lands—whether prairie or timber.

A. I should say mostly prairie land; there are strips of timber on it.

9. Can you state what quantity of land is not prairie land, ap-roximately?

A. Well, that depends upon how the eastern boundary line lies.

10. The road is the east boundary.

A. I thought it was east of that. If it is, there are strips of timber lying along the ravines, but they are most all prairie lands.

11. I will ask you the character of such lands as are not prairie lands. As to the character of the timber, is it not brush, sapp*l*ing, and young oak?

A. There is what we call pin-oak land and brush growing up along the ravines; strips of it.

12. I will ask you if there was any of that timber that was what would be called saw timber or rail timber.

A. Very little, I should think; according to my recollection, very little of it. My impression is that there might have been some that might have been cut into rails.

13. State the magnitude of those trees that might be cut into rails. Were they two-cut?

187 A. No, sir; very rare chance to find one that would make *a* two rails.

14. How many butt cut?

A. I am not very well posted. It would depend something upon the size of the rail; but the timber was generally small, I think, and a great deal of that timber was hollow at the butt. We find it so all through that country. Those pin oaks, though seemingly sound on the outer edge, are generally hollow.

15. Would they make ½ dozen to the butt cut?

A. Some of them might of the ordinary sized rail.

16. I will ask you, Mr. Cooper, to state whether or not any portion of that land described by you and referred to in your testimony

contained trees capable of making saw logs, and worth from $1.50 to $2.00, $3.00, & $4.00 apiece.

A. I should think not. There might be occasionally a tree of that kind. I can't tell; it was so long ago, but it would be the exception if there were.

17. Could you say that it would be possible for trees of a sufficient number and size to make from two to five hundred saw logs?

A. It couldn't be done.

188 18. Well, say from nothing to five hundred logs.

A. You might find some few saw logs there.

19. Ranging from one to four dollars apiece to the tree?

A. I should think it would be quite an exception to find half a dozen. I used to be tolerably familiar through there, but it is so long ago that I can't say definitely.

20. From your knowledge of such land as you have described as not being prairie land would it be possible to make from twenty-five hundred to five thousand stakes?

A. I think it would be possible to make a good many stakes and occasionally a few rails; but there would not be very much rail timber.

21. Not much rail timber?

A. No, sir; you could make stakes out of most anything.

22. If there had been such timber as I have inquired in reference to during the years '74, '5, '6 would you have known it?

A. I think I would.

23. State if it was possible for such timber to have been there during those years.

A. No, sir; I don't think it was.

189 24. I will ask you now, with reference to the house- that have been on those lands, have you any knowledge of there being any buildings on those lands at any time. If so, state where they were situated on those lands.

A. I don't remember of any buildings being there. If there was it was a small cabin building for tenants' use. I don't remember of any cabin being there. If there was I don't remember of the location of it.

25. If at any time there was a house on any portion of said lands worth from seven to eight hundred dollars would you have known it?

A. Yes, sir; there was none there worth that amount, I am satisfied.

26. At any time?

A. Yes, sir.

27. If there ever was such a cabin as you have specified upon those lands can you state what became of that cabin?

A. No, sir.

28. What would be the rental value of such a cabin, if any?

A. Nothing at all, I should think.

29. Please state when and at whose instance that cabin was placed upon those lands.

190 A. If placed there at all it was placed there at the time Mr. Turney was claiming the land.

30. Do you remember the time when he returned from Washington Territory?

A. No, sir; I do not.

31. Can you state whether it was put there before or after he went to Washington Territory?

A. Afterwards, I think. I know Turney did have some improvements put there in the way of fencing.

32. Do you know of his putting any wheat there?

Counsel objects.

A. No, sir.

33. If you knew of his putting that house there * * *

A. No, sir; I don't know anything about the house; it is only an impression that there was a cabin there. I am not satisfied in my own mind that there was anything there at all.

34. I will ask you to state, Mr. Cooper, if during the time you have known the lands *if* they were ever enclosed.

A. They was at one time enclosed.

35. Please state when that was.

A. I know of Mr. Turney putting a fence around it and putting in wheat. It seems to me it was before the war that was
191 done. I can't fix the time.

36. Was it after the war?

A. I don't think he enclosed it after the war.

37. At the time of this shed of which you have spoken, were they enclosed then?

A. I think they were. I don't know when that was, but that I think there was a building there for a tenant.

38. If that house was put there in '72 were the [they] enclosed at that time?

A. I do not know whether they were or not; I think not in '72.

39. I will ask you to state whether or not they were at that time in common.

A. I am satisfied that Mr. Turney enclosed that whole tract and put a portion of it in wheat, but afterwards it was thrown into common and the road run diagonally through it.

40. After it had been fenced it was thrown into common?

A. Yes, sir.

41. Do you know the present condition of the timber on the lands and whether there have been any rails split and saw logs hauled off those lands?

192 A. I don't think there were any saw-logs on that land to haul off or rails to split. I don't think of late years there was any timber that could make either.

Cross-examination by Mr. HANNA:

Q. Have you examined that land during the last twelve years to see the condition of the timber? There is some eighty acres of timber there.

A. I don't think there is that much; don't think altogether there is more than twenty acres.

2. Might there not have been many saw-logs taken off there?

A. I think at one time Turney put a little saw-mill there or close to it, but he didn't make but very little timber into lumber. He aimed to do so, but he didn't get any planks for his fence; he cut perhaps a thousand feet.

3. Who first put it into cultivation for Turney?

A. He hired hand- and put — under cultivation himself.

4. Do you remember of Squire George superintending that work?

A. I don't know, but think he might have done so.

193 5. Do you remember of Mr. Geddis buying a large number of saw-logs there when he ran his mill here, in '64–'5?

A. No, sir.

7. Do you remember of a man by the name of Snyder hauling logs off of it?

A. No, sir.

8. Do you remember of Alex. Johnson hauling logs away from it?

A. No, sir; I do not.

9. Do you know whether they did or not without making an examination?

A. That might have been done without my knowing it.

10. Do you remember of Mr. Linder cutting logs off of it—saw logs?

A. No, sir. I recollect that Mr. Linder was working there. He was cutting timber, I suppose.

11. How long ago was that? Was it during '73, '4, '5, '6?

A. It might have been.

12. Did you ever see Snyder, the German, hauling logs there?

A. No, sir.

13. Did you ever see Jo. Williams cutting logs there?

A. No, sir.

194 14. Do you know Jo. Williams?

A. I think so.

15. Do you know where he is now?

A. No, sir.

16. Did you ever ride or go over that timber with a view of seeing what timber was there?

A. No, sir; but I have driven over it a thousand times hunting.

17. I am referring to that land next Nichols and running clear up to the Beacher trestle.

A. Yes, sir.

18. And there is thirty or forty acres of prairie there?

A. Yes, sir.

19. And is not the next forty before that good timber?

A. No, sir.

20. And there are no white oaks there?

A. None of any consequence—hardly any.

21. Now, with regard to the houses on that land, how many houses have there been on it?

A. I don't remember of seeing a house there. My impression is that there was a cabin there before the war.

22. Do you remember of Harvey Stewart living there?

195 A. No, sir.

23. Do you remember Albert Sloan living there?

A. No, sir.

24. Do you remember a widow living there?

A. No, sir.

25. Do you remember the house by the creek, up there some distance?

A. I think I remember some house being there.

26. Do you remember of a third house that stood over there near Richardson's?

A. There is a house there now.

27. That was put there by Holmes—I mean the one before that?

A. I can say that if there was — house there it was so small that it was unimportant and I didn't notice it.

28. Do you remember when this land was under cultivation last?

A. No, sir.

29. Do you remember when Slocum had wheat there, in '63?

A. I remember Turner put wheat in and let Slocum have it.

30. What year was that?

A. I thought it must have been before the war. It must have been since.

31. Do you remember Turner put it in in '63?

196 A. No, sir; I don't remember that in the summer of '63; no. Where was the south boundary line of the Slevin land at that time?

32. The road *road* running down from Holmes at that time; the other forty runs through the south—twenty or thirty rods further south—to what is known as the old Williams forty.

A. I think there was a cabin—a kind of log cabin—on the Williams forty.

33. Do you know who took it off?

A. No, sir.

34. The Wilmans forty was not designated generally as Slevins' land?

A. No, sir.

Re-examination by Mr. CONKLING:

Q. I will ask you if, on the land just east of this land, cutting of the character to which your attention has been called was not done by Mr. George.

A. Why, yes. There is considerable timber on that.

2. Is it not true that such cutting was done on that?

A. I think so. I think George had just cleared that for the timber. I know there was considerable timber there, and there

197 is a little timber on the west side of the road going up, and some of that might have made a few rails.

Testimony of G. R. George.

G. R. GEORGE, being first duly sworn, testified, viz:

Q. Please give your name, age, and residence and occupation to the master.

A. G. R. George; reside in Fairfield; age, forty-six; occupation, am a lawyer by profession.

2. Please state, Mr. George, whether you have been associated with others in the practice of your profession here.

A. Yes, sir; C. A. Beecher and R. J. Saylor.

3. Are you acquainted with the parties to this suit?

A. I was acquainted with Turney, and am with the Slevins, of Cincinnati, and with Mr. Adams here.

4. I will ask you, Mr. George, if you are acquainted with the real estate, situated near Fairfield, known as the half sect. east of 36, T. I S., R. 7 E., and the N. W. N. W. of sect. six, T. I S., R. 8 E.

A. Yes, sir.

5. How long have you been acquainted with those lands?

A. Well, about twenty-seven years.

198 6. Please state the character of those land-; whether prairie or timber lands.

A. Both timber and prairie.

7. Did you ever sustain any relation, as agent or otherwise, to the defendants in the original bill—the Slevins?

A. I have paid some taxes for them. I came into the firm I named in '66. I was in the office — '64 and '65, and I paid the taxes on them for a good many years; up to '75 or along there. Mr. Beecher had paid them before I went into the office and before I went into the firm.

8. You may state what portion, perhaps, of those lands was timber lands and what prairie lands.

A. Take the timber and the brush—there's sapplings there, too—there is one place of about forty acres of timber on the N. E. ¼th of sect. 36. That would include where it runs down into the brush. On the south end before the R. R. was cut through there was probably twenty acres running through to the Holmes place, including sapplings, brush, etc., of timber with big trees through it. I don't think there was more than thirty or forty acres on the whole

199 tract, including the piece in No. 6.

By the MASTER:

Q. On which side of the road is Rider's place?

A. The east side.

9. You may state, Mr. George, what relation you sustained as agent.

A. We paid the taxes for them, and we were attorneys for the Slevins about getting possession of this land after it had been taken possession of by Turney.

10. What year was that?

A. In '72, I think; that is my impression.

11. What rendered it necessary for you to institute proceedings?

A. There was a house built on the land between thirty-six and seven.

12. What was the size of the building of which you speak?

A. Well, I should say it was a frame house with two rooms in it. I do not know how long a house it was. The house is somewhere close there yet. It was moved inside the corporation. I would not know the house now unless it was pointed out to me.

13. What was the original cost of that building?

A. Well, I don't know. I don't think the house, all told,
200 would cost over two hundred dollars, and it mightn't cost that.

14. What became of that house?

A. I don't know, but I understand that a man named Nalley—Mose Nalley—moved it off.

15. What, if anything, did you do towards selling or removing that house?

A. Nothing. I didn't know anything about that.

16. Did you sell the house?

A. No, sir; Mr. Nalley, I think, sold it.

17. Did you say stole it?

A. Yes, sir; just stole it.

18. Sold it or stole?

A. Did both; first thing I knew a man in town was living in it.

19. Were you instrumental in selling or stealing it?

A. I didn't know anything about it. We were glad to get rid of it, as it was a sourse of bother to us in the possession of the land, and we wanted it away.

20. At that time did any person have any visible or tangible possession of the land?

A. At the time the house was built there?

21. Yes; and at the time it was taken away.

A. At the time the house was built there was no fence there at all.

201 22. Upon any of this land?

A. No, sir; not the upper part of this land. There might have been a piece on No. 6.

23. State the object, if you know, in the erection of that building.

A. It was, I suppose, to get possession of the land.

24. By whom?

A. Turney, who built it. We were getting ready to sue and were corresponding with the Slevins, and on the day set for the trial before the justice Slevin telegraphed us if necessary to have them here to continue the suit. The woman had made some kind of a contract with Turney, but she said she would give it up rather than go to law about it. Sq., the officer, went down and set them out of the house. My recollection is that Stewart made a contract with us to hold the premises, and then he left there. I think he just made a garden spot about the house. I do not know how long he staid there

and when he went away. This man Nally got in there. I asked Nalley about being in there, and he said he had just stopped there, and the other man left him stay in.

202 25. Was that house worth seven or eight hundred dollars?

A. No, sir.

26. Would it rent for seven or eight dollars a month then?

A. No, sir.

27. Would it rent for that now?

A. I don't know where it is now.

28. Would it rent for anything?

A. It would rent, if all right, for probably five dollars. It was a very small frame house. I don't think it was more than 14 or 15 feet wide and not more than twice that in length.

29. Were you or the Slevins responsible for the removal of it?

A. No, sir; not that I know of.

30. I will ask you if at any time you, as the agent of the Slevins—you sold to any person or persons any portion of the timber on any part of those lands of Slevins.

A. No, sir.

31. Did you sell any to Albert Sloan?

A. No, sir.

32. Or to Amanda Gaston?

A. No, sir.

33. Or John Gaston?

A. No, sir.

203 34. Or Samuel Linder?

A. No, sir.

35. Or Joseph Williams?

A. No, sir.

36. Or anybody else?

A. No, sir.

37. This man Stewart was on the land under a lease?

A. Yes, sir; they put him in to keep Turney off the land.

38. Did you sell any saw logs to the persons mentioned or to either of them or anybody else, or did they or any of them ever pay you any money for saw logs or rail timber?

A. No, sir.

39. Either as Mr. George, as the agent of the Slevins?

A. No, sir; if they got it they took it.

40. Did you in any way dispose of any of that timber yourself?

A. No, sir; but I did of timber that was on my own land, on the other side of the road and adjoining that land and opposite the Slevin lands. My land runs along that for three-quarters of a mile. I let parties have timber for clearing it off. These logs were

204 taken off that land by Snyder, and I think they were taken to the Saylor mill.

41. What year was that?

A. I think it must have been along in '70 some of those logs taken off my land were hauled by Mr. Geddis and taken to his saw-mill, and possibly some of them were hauled to Mr. Saylor's, who had the mill before Geddis. I don't think any of the logs were

taken off my land, for certain, but these men, Snyder and Johnson, hauled logs, and I got Saylor to stop them. I can't say that they didn't haul them to Geddis. The timber on the Slevin land was all post-oak timber; there were no white oaks on the land. All the saw-logs were post oak, because I went and looked at the stumps. I think they might have cut five or six logs there, and I made them stop.

42. In the year 1875 did you sell a large amount of timber off of said land to Mr. Sloan?

A. No, sir.

43. One of the witnesses has testified, "When Turney left for Washington Territory, in '61, there was eighty acres of white oak on said land." Is that true?

A. No, sir; not as to the quantity of the timber.

205 44. "About the year '75 a large amount of timber was cut and sold off of said land. Said timber was sold by G. J. George, as agent for the Slevins." Is that true?

A. No, sir.

45. The "Slevins had possession of that land for about ten years before that time." Is that true?

A. I don't know. All the possession we had I have stated. We paid the taxes and put that man off in '72; that is my recollection. During the war I don't know anything about the land.

46. "They took possession in the summer of '63 and had peac-able possession of all of said land from about '63 until '75." Is that true?

A. I don't know anything about the land during the war and until 1865.

47. How as to '65 to '75?

A. Nobody disputed the possession of that land until Turney put that house on it.

48. Is this statement true: "During that time all the good timber was cut off that land" (between '65 and '75)?

A. The timber was taken during that time, I think. I don't think it was good timber.

49. Is this true: "It was sold by G. J. George, acting as the agent of the Slevins?"

206 A. No, sir.

50. Is that positive averment true?

A. No, sir.

51. Is this statement true: "A great amount of cord wood was also cut and sold off of said land by G. J. George during that time?"

A. No, sir.

52. Is this statement true: "And G. J. George also had a number of men making rails off of that land?"

A. I never made a rail on it in my life and never had it done. They might possibly have gotten over the line on the north, but I don't think they did.

53. Is this true: "Samuel Linder, John Fitzgerald, and several

parties were engaged in cutting wood and making rails on said land during the years '74, '5 and '6?"

A. I do not know of it. I had no knowledge of their doing so.

54. "They were employed by G. J. George, as agent of the Slevins, to do said work." Is that true?

A. I do not remember whether I employed those men or not. I had several thousand rails cut on my own land.

55. On this land?

207 A. No, sir; on my own land. If I employed them it was on my own land. I never employed any man to make rails on that land.

56. Slevin didn't employ men to cut rails on that land?

A. No, sir; but I had, perhaps, twenty men working for me.

By the MASTER:

Q. As I understand you, they never, with your knowledge and under your approbation, cut timber on the Slevin land?

A. Some men might have come and asked me for a dead tree on the Slevin land as they have done on my land; but I never sold any tree or trees. During that time I had plenty of my own and didn't want it nohow.

57. I want you to state what is the truthfulness of those answers I have read from such depositions to you.

A. I never had anything to do with that timber unless it was to give a man a dead tree when he came and asked me for it. As to these men you named, I expect that they worked for me on my land, but I never had anything to do with the Slevin timber land except the time that I went to Saylor, when I heard that

208 men were taking that timber, and got him to stop it.

58. I will get you to state, Mr. George, whether or not these acts were or were not done for the preservation of the Slevin land and not for its spoliation.

A. Yes, sir; I suppose so. I didn't want to take the timber off of that land.

59. If at any time any person or persons cut or hauled timber away from the Slevin land, was it or was it not done contrary to your knowledge, permission, and consent?

A. Yes, sir; and without the knowledge of the Slevins, so far as I know.

60. Did you at any time knowingly suffer any person to trespass on the Slevin land in any way?

A. Not unless to get old dead-wood. The R. R. Co. cut four or five acres there.

61. Who was the agent of the R. R. Co. at that time?

A. I don't know.

By the MASTER:

Q. They cut on their right of way?

A. Yes, sir, and beyond.

62. Who at any time was looking after that land?

A. I don't know.

209 63. Have they any local director?

A. I don't know. The first thing I knew they had cut it from the west side of R. R. onto the first creek. They were young sapplings. There was no valuable timber on it; might be good enough for wood.

64. Here is another statement I will read to you: "There was a house on said land, as stated in my answer to inquiry 3rd, and G. J. George was controlling that house as the agent of Slevins. I rented the house of him where it stood on the land and paid him the rental. This was in '74 or '75." Is that true?

A. The only man who lived in the house was Harvey Stewart, and no one ever paid me any rent.

63. This man is Sloan?

A. I don't recollect of that. My recollection is that the house was down-town when he lived in it.

65. Did he rent the house of you and pay you rent?

A. I don't know of it.

66. Did he rent the house of you?

A. I don't think he did.

67. Do you say that he did or did not?

A. I would say not.

210 68. Is this true: "Mr. George sold this house to Nalley and I purchased it of Nalley?"

A. No, sir; I never knew before that he moved it. I thought Nalley moved it away. I supposed that Nalley moved it, for the first thing I knew it was moved into town and he was gone.

69. Is this statement true: "I know that Harvey Stewart rented the house and land before I lived there and while George & Saylor were the agents for the land?"

A. Yes, sir; that's true.

70. Did he rent it of you?

A. Yes, sir.

71. He says he lived there all of the winter and part of the summer—about nine months, more or less?

A. That is my remembrance of it.

72. How long did it take to send the lease to Slevin and get it signed for Stewart?

A. My recollection is that he went right in at that time of the trial. This woman was talking to the justice when I went over, and he told her she had better go out and she would be put out anyway, and she said if she was going to have any bother she
211 would not put up the fence. I made a proposition for her to go out that day. She said she would. My recollection is that Stewart went in then. We made the contract with him so as to hold the land. Turney put the house up so as to be on the line. We found it was on the line when we brought this suit. In order to cover the whole thing we made this contract with Stewart for a year to settle the question.

73. That was in opposition to the attempt of Turney to get the land?

A. Yes, sir; that was the intention. I think the record of the

suit is in this building where the justice's office was. At the time this house was taken away there was a notice served by the commissioner of highways to remove the house out of the road, as they were going to put a public road there. They came and asked me if I was the agent of the house, as they were going to put a road where the house was. I told them just to move it, I wouldn't move it; but before they came round with the road that house was gone.

74. That was the end of the struggle about the possession?

A. Yes, sir; Mr. Rider bought that forty acres about that time.

212 By the MASTER:

Q. Is that the south forty?

A. Yes, sir; the southeast forty.

75. I notice, Mr. George, in the testimony of John T. Fitzgerald the following statement: "G. J. George, as the agent of the Slevins, employed myself and brother-in-law to cut wood and make rails and stakes on this land, describing the numbers, in the year '74 or '75." Is that true?

A. No, sir; it was on my land.

77. "Further, I think he cut twelve or fifteen cords of wood and one or three thousand rails and three or four hundred sticks, and G. J. George, as the agent of the Slevins, paid me for the work?"

A. They made rails for me, but I paid for them, for that work, on my land and not on the Slevin land.

78. Is it true or false?

A. It is false as to that land; it was on my land.

79. They state they were paid ten dollars per thousand to make rails and sticks?

A. They were paid one dollar per hundred for rails and eighty cents for stakes.

80. Was that on the Slevin land?

A. No, sir; on my own land.

213 81. They make this further statement: "I know Samuel Linder was employed about that time to cut and haul logs off that land."

A. I don't know anything about that.

82. If it is true, was it on the Slevin land and by you?

A. I don't know if it was on the Slevin land or not; it was not by me. I don't know who cut those logs on the Slevin land.

83. Do you remember of any such cutting at the time mentioned; if so, upon whose land was such cutting done?

A. They cut quite a good many logs about '74 or '75. They cut most of that grove of timber out. I do not know how many.

84. If such cutting was done on that land would not the stumps be visible at the present time?

A. Yes, sir; I should think they would, as they are post oak.

85. If, upon an examination of such land, no such stumps were found, could that statement be true?

A. I don't think it would be.

Objected to by counsel as merely expert testimony and do not know whether he is an authority on stumps or not.

214 WITNESS: I am a pretty good stumper.

86. At the time the cutting referred to was done was it not done on your land and not on the Slevin land?

A. About that time work was being done on my land. I was having it cleared, and it was about the time they talk- about logs being cut on the Slevins land. I know there was no taking of logs from there for profit by the Slevins or anybody, so far as I know; but it was done to some extent; to what extent I don't know, for I had it stopped.

Cross-examination by Mr. HANNA:

Q. But it is a fact, Mr. George, that a large amount of timber, valuable timber, was taken off the Slevin land about that time—saw logs and rail timber?

A. I don't know about the rails; there was some logs taken.

2. Were they taken to Geddis' or Saylor's mill?

A. They were taken to Saylor's mills.

3. Were any taken to Geddis'?

A. I don't know.

4. Where did Snyder get his logs?

A. Off the Slevin land.

215 5. And didn't Snyder haul more than two hundred saw logs off?

A. I don't know. Snyder was the man I wanted Saylor to have stopped.

6. What distinction is there between post oak and white oak?

A. One is post oak and the other is white oak.

7. There is a difference between red oak and white oak; what is the difference between post oak and white oak?

A. Difference in the fiber.

8. There's some there now; are they white oak?

A. I am not sure; there is some pretty big trees there.

9. Were they not same as trees taken off?

A. Not if they were white oak.

10. I will ask you to state if, to your knowledge, during the years '74 and '75, there were not, by somebody, more than 200 saw logs taken off that land?

A. I don't know how many; they cut a good many.

11. Wouldn't some of those trees that were cut make three logs?

A. I don't know how many they would make.

By the MASTER:

Q. Did you ever count the stumps?

216 A. No; not that I know of.

12. You have been over the Slevin land?

A. I went part way, when I found it out, and I came down and got them to stop it.

13. Do you remember the amount?

A. No, sir.

14. It was a nice grove?

A. Yes, sir; a nice grove.

15. This house, you say, you rented to Stewart as the agent of Slevin?

A. I never had anything to do with the house up to the time of the suit.

16. You contracted with Stewart and sent to Cincinnati and got a contract for him from the Slévins?

A. My recollection is that they sent it here; but a contract of that kind was made to prevent it being occupied by Turney.

17. How long did Stewart live there?

A. I think he fixed up a garden.

18. He lived there all that summer?

A. Yes, sir.

19. Who got possession from Stewart?

A. Nalley, I think.

20. And Nalley's the man you think moved the house off?

A. I always thought so.

217 21. Nalley sold his interest to Sloan?

A. I don't know.

22. You say that house would only rent for five dollars a month. Has not that house four rooms instead of two?

A. I don't know.

23. Is not that the house that John Powell lives in now?

A. I don't know.

24. Wouldn't a house of that size rent for six dollars?

A. I don't know the house nor what it would rent for, and I wouldn't know the house unless it stood where it was then. My impression is that it was not a large house.

25. Well, if it was only a house of two rooms wouldn't it rent for eight dollars a month?

A. My impression is from what it was there.

26. Wasn't it only moved about a hundred feet?

A. Yes, sir; think so.

27. How far now to where Powell lives?

A. I should think it was about twenty rods or more.

218 28. You think that would make a difference in the renting of it?

A. I don't know where it is now or where Powell lives.

29. Turney built the house and had taken possession of it while Slevins had possession of the land?

A. Yes, sir.

30. Do you know who took off the old frame and log house that stood by the creek?

A. No, sir.

31. Do you know who took the tenant-house near Hohnes'—weren't there three houses altogether on that land?

A. I don't know of those at all, and don't know what became of them.

32. Weren't they taken after the Slevins got possession of the land—those three?

A. I don't know.

33. Then when Turney came back from Oregon he built another?

A. I don't know. I think the first one was a log house with a plastered kitchen, and that it was thrown down at the close of the war. I don't know when it was taken away. It seems to me that was away back of the war.

34. There has been three house- there?

219 A. I don't recollect of them. Those other houses were away when I came back from the war.

35. They were there when you went to the war and off when you came back?

A. Yes, sir.

36. Didn't John Hoffmeyer live in that house?

A. I don't remember. I think George Wilkington lived there before the war.

37. You remember three house-?

A. That one was hardly a house.

38. Well, two and a half houses, then?

A. Yes, sir.

39. And they were all taken off while the Slevins had possession of the land?

A. I don't know when they got possession myself.

Counsel for Slevins object to filling this record as to when Slevins got possession of this land, incumbering this land with an unprovable fact.

Mr. HANNA: Mr. George made a deposition three years ago in which he said: "I am acquainted with the land. Do you know who received possession of this land from Turney? A. The Slevins received possession in 1863, as I am informed by themselves. Q. Who had possession of this land from '63 to '75? A. The

220 Slevins. Q. Who had possession of that land in '76 within a few weeks after Turney took possession? A. The Slevins."

Mr. CONKLING: Mr. George has explained that by a subsequent deposition, and the deposition of Mr. Beecher shows that the possession is a controverted point.

40. Were those houses taken off between the summer of '63 & '76 during those seventeen years?

A. I don't know when they were taken off. One of the houses was on when I went to the war, and was not there when I came back. I only know of one house. I think the other was gone before the war—that is, the homestead.

41. As the agent of the Slevins, did you sell forty acres of land to Holmes?

A. No, sir.

42. Who did?

A. I think Holmes made the contract with the Slevins themselves.

43. When?

A. In '71 or '72, I think.

44. Has he put any fence there since?

A. Yes, sir.

45. He got peaceable possession from the Slevins, and has held it ever since?

221 A. Yes, sir.

46. He has possession of that and he got possession of it?

A. From the Slevins themselves. They made the contract and the conveyance themselves direct with him.

47. I will ask you if you can make any estimate of the value of the timber removed off this land during the years '73, '4, '5, '6?

A. I couldn't.

48. You couldn't put any estimate on it?

A. No, sir.

Re-examination:

Q. What do you mean by possession—actual or constructive?

A. I just mean what I say.

2. Well, you are a lawyer, and you know whether Mr. Turney attempted to take possession of those lands and whether there was any actual possession or not at that time by any one, or whether it was a portion of the commons over which any one and everybody passed?

A. I think at that time Mr. Holmes had fenced his off.

3. I am speaking of the two hundred and eighty acres of land.

222 A. That is part of the tract.

4. Was it in the possession of anybody or was it open to the public?

A. There was probab-y a little fence on section six.

5. When Mr. Turney erected that house was not that portion occupied by the public and not by the Slevins, or by anybody for them?

A. Yes, sir; it was lying open.

6. And the part you took was to prevent Turney from getting actual possession?

A. Yes, sir.

7. And when that ceased it returned into the undisputed possession of the public?

A. We just wanted to keep Turney out of it.

8. Is it not in fact true that when Turney ceased to have possession of the land it returned to the actual possession of the public?

A. We took the house, and he let it go when he found he couldn't keep it any longer.

9. Was it two or more rooms?

A. Only two, I think.

10. After that the house was stolen and removed?

A. Yes, sir. I don't know where it is now.

11. And if it has more rooms they have been added to it since?

223 A. Yes, sir. There must be some difference. I think the house had only two rooms, and little, small rooms at that. It might be bigger than that, as it is a long time since.

12. At the time I passed you to Mr. Hanna I had not noticed this statement, made by Mr. Linder: "In the winter of '75 there was about five thousand rails and stakes on the land, made by G. J. George." Is that true or false?

A. It is not true; they were on my land.

13. "The rails and stakes were put on the farm of G. J. George." Is that true?

A. No, sir. If any rails or stakes were made on that land it was just at the corner of my land; but I don't think they went over at all. I don't think there was any timber there.

14. These rails and stakes were made by the direction and order of G. J. George, as the agent of the Slevins." Is that true?

A. That is not true. I do not wish to contradict the man, tho' he might easily have been mistaken, as the land lay side by side and I made between twenty and thirty thousand rails & stakes there myself for two and a half miles of fence.

224 15. Do you — Joseph Williams?

A. Am just acquainted with him, simply.

16. Now, speaking of the character of these logs, Mr. George, "The logs we cut were from good timber, making from two to five logs to the tree." Is that true with reference to the character of the timber on the Slevin land?

A. I don't think there was any timber there that would make it.

17. "The logs were worth on an average from two dollars to two fifty each." Were those worth that much?

A. I should think not.

18. Do you think it is true that there were trees there that were capable of making two to five logs each and of sufficient magnitude to be worth any such sum each?

A. No, sir.

19. Admitting that to be true, what would be the value of such timber at that time?

A. I wouldn't have any idea of it at that time. I wouldn't think, however, that the best logs they could get would be worth more than a dollar apiece at the tree.

20. I will ask you to give us your idea of a saw log, if you have any idea?

225 A. My idea is a saw log is one that will make lumber.

21. Of what diameter?

A. They make from ten inches up.

22. Would a stick the size of that stove-pipe be saw-log timber?

A. No, sir; saw sticks measure from the top down, and they take nothing less than ten inches at the top.

23. Would it be possible for any of the timber on the Slevin land to make a saw log over a foot in diameter?

A. Yes, sir; some of the post oaks there are two feet at the bottom; they are very rough trees, however.

24. "About or near the same time I was employed by G. J. George,

as the agent of Slevins, to cut rails at one dollar a thousand." Is it true that you employed him as the agent of the Slevins?

A. No, sir; I never did as agent of the Slevins. I don't know whether it is false, but I know whose land they were working on, and that I never employed them to cut on the Slevin land.

By the MASTER:

Q. Was the road through there at that time?

226 A. No, sir; it was in woods. These two run up together—Slevin's and mine.

Recross-examination by Mr. HANNA:

Q. I will ask you if there was not a good many trees cut off the Slevin land as much as two and a half feet through?

A. I don't think there was; not many. There are a few good trees there. There was but a few there.

Q. Were there many there that would average two feet?

A. Not many there; not many of that size on the land, and they are those up next to Mr. Nickolls.

By the MASTER:

Q. What would be the present value of such trees as you have described?

A. Two feet in diameter; if they would make two logs would be worth three dollars.

Re-examination by Mr. CONKLING:

Q. Were you other than a taxes-paying agent?

A. No, sir; all I ever done was to pay the taxes and what was done as attorney with Turney.

227 Recross-examination:

Q. Were — not also agent for keeping Turney out of possession?

A. Yes, sir.

2. Did you put Stewart on there for the purpose of holding the possession against Turney?

A. Yes, sir.

By Mr. CONKLING:

Q. The suit was abandoned?

A. Yes, sir.

3. I wish to call your attention to the deposition of Mr. Geddis. Are you acquainted with John Geddis?

A. Yes, sir.

4. What is his his occupation?

A. Miller.

5. Saw-mill?

A. Yes, sir.

6. And he is engaged in that business now?

A. Yes, sir.

7. Is he a man that would know the value of logs and timber?

A. I think he would better than I would, as he has been at it a long time.

8. I will ask you if the value of logs at that time was not eight cents a foot at the little end, a log having ten inches at the end?

228 A. I don't know.

9. Don't they measure that way?

A. Yes, sir; a log two feet across would be worth two dollars if they measured that way.

Re-examination by Mr. CONKLING:

Q. Would the estimate of Geddis be reliable?

A. Yes, sir; I should think he was a straight man.

2. He says he got forty or fifty logs worth forty to fifty cents a log.

A. Yes, sir; I should think that would be reliable.

229 *Testimony of John H. Nicholls.*

JOHN H. NICHOLLS, being first duly sworn, testified:

Q. What is your name, age, and residence, Mr. Nicholls?

A. John H. Nicholls.

2. Where do you reside?

A. About a mile and a half out of town, north, right adjoining this disputed land; my place joins it.

3. Are you acquainted with this land?

A. Yes, sir.

4. How long have you known it?

A. For about twenty years.

5. What is the character of the land, prairie or timber?

A. Prairie, most of it.

6. What is the character of that land, so much of it as you would call timber?

A. Well, just what I would call brush, most of it; there is some good trees on it.

7. Now?

A. Yes, sir; there's yet some good trees on it.

8. What was the character of the timber on the land in the years '73, '4, '5, '6?

A. There was some pretty good timber on it then.

9. On what part and to what extent?

230 A. I don't know exactly how much there was.

10. Do you know whether any of that has been taken off the land?

A. There were some saw-logs cut and taken off.

11. When?

A. About the time the R. R. was put through; about the time Saylor's mill was here.

12. Who took them off?

A. I don't know. I was not acquainted with the man. I think

it was a man who lived here in town by the name of Snyder who hauled some of it off.

13. What was the magnitude of those logs?

A. I don't know the size of them.

14. Did you ever examine the land particularly?

A. I have been over the farm or part of it.

15. Have you been over the land since the cutting to see it?

A. No, sir.

16. You never made any examination of it?

A. No, sir.

17. Do you know whether Mr. George cut any of those logs off?

A. No, sir; I do not know whether he cut any of the timber or not.

18. Do you know where the line of the land ran at that time?

231 A. No, sir; I think it was the township line, though.

19. Isn't it true that those logs were cut to the east of the line?

A. They were cut to the west side of the line on the land owned by Slevin.

20. Can you state the number or size of them?

A. No, sir.

21. Can you state anything of the value of them?

A. No, sir; I don't know what they were paying for logs at that time.

22. Do you know what they were worth?

A. No, sir; I don't know what they were worth?

23. Did you make any observation of the buildings that were on that land?

A. There was a little house built up there by Turney, the one they were talking of a while ago. I recollect that well enough.

24. Describe it.

A. It was a little frame house, if I mistake not, and it stood right where the road now runs, and John Powell lives in it now. It was moved off.

25. How many rooms were in it?

A. I was never in the house. I don't suppose there were more than two rooms in it when it stood up there, and I have

232 never been in it since Powell lived in it.

26. Has it been changed any?

A. There has been a shed kitchen and a porch added to it since it was moved to town.

27. Do you know who moved that house?

A. No, sir; it was moved up the time that Sloan lived in it. I think it was Sloan.

Cross-examination:

Q. You can't state the number of trees that were taken off the land?

A. No, sir.

2. You know they cut a considerable number of logs off of it?

A. They cut several trees. What they made of them I don't know.
3. You live north of that piece?
A. Yes, sir.
4. Have you ever farmed this land?
A. Yes, sir.
5. You have a crop in it now?
A. No, sir; not now.
6. You did have wheat?
A. No, sir; never raised anything but corn on it.
7. State whether it is good farming land.
A. It is tolerable good land; had pretty good corn the first year, and the next year it was not so good.
233 8. What is the cash rental of that land?
A. We agreed to pay one-third of the crop.
9. You rented it of me?
A. Yes, sir; you and Bob Adams.
10. What would be a fair cash rent for it last year or any year?

Objected to.

11. Do you know of any rails made on that land, or stakes?
A. No, sir. I noticed one thing: When they were going to fence it Mr. Adams came to me and wanted me to join fences with him.
12. When Adams got possession of it it was not under fence and it laid out in the commons?
A. Yes, sir.

Re-examination:

Q. At the time you first knew the lands they were in commons?
A. Yes, sir.

By Mr. HANNA:

Q. You came here in '65?
A. Yes, sir; about the winding up of the war.

By Mr. CONKLING:

Q. And ever since '65 they have been commons?
A. Yes, sir.

Testimony of Alexander Richardson.

ALEXANDER RICHARDSON, being first duly sworn, testified:

By Mr. CONKLING:

234 Q. State your name, age, and residence.
A. Alexander Richardson; age, fifty-six; reside about a mile out of Fairfield, northwest of it.
2. Are you acquainted with the Slevin or Turney lands?
A. I am acquainted with some of them.
3. What is the character of this land as to being prairie or timber land?
A. Principally all prairie.

4. What is the character of so much as would be called timber, and what has been the character of the timber?

A. On the east side there — some good trees, the balance is mostly brush. On the east side of the land there's some good timber.

5. Has any of that timber been cut off the land in the years '74, '5, & '6?

A. Some of it has been cut off. Lee Turney tried to cut some of it. He built a saw-mill during the time he was fencing it and he cut it then. He had a saw-mill there at that time.

6. The cutting on that land was then by Turney himself?

A. He cut some portion; not a great deal, I think. I was there when he was cutting it. It was rough and he couldn't
235 cut it in his mill. It was knotty timber and was difficult to cut.

7. Can you give us any idea of the size of the largest tree he cut?

A. I suppose there were scattering trees that would cut two feet through.

8. How many of those?

A. I couldn't say.

9. A considerable number of trees?

A. I couldn't say exactly. There was a considerable number of trees.

10. The cutting you know of was done by himself?

A. I have seen cutting done there by others, but I didn't know on what land it was done.

11. Do you know now?

A. Yes, sir; by the road running up there. It must have been on the south side.

12. Can you fix the value?

A. No, sir.

13. Nor the number of trees?

A. No, sir.

14. Do you remember of seeing any buildings on that land?

A. Yes, sir; I seen some buildings there.

15. Describe them.

A. There was a little building on the back part of it; then there was a plank building up where the road now is. There was
236 another building on the west side, towards the road.

16. At the time those buildings were there were those lands occupied?

A. There was a fence around them at that time, when Turney was occupying them, about '56—fifty-six; along there—'56, '7, & '8.

17. At the time this building was put where the road now is were the lands occupied or were they in public common?

A. By that time they were all common again.

18. How long have you known those lands?

A. About thirty-two years.

19. For how many years past have those lands been in open commons with nobody in actual possession?

A. Been fenced up for some few years.

20. From the first time till they were thrown out?

A. They were mostly thrown out, it appears to me, about '63 or '4; somewhere about that time they were mostly thrown out again.

By the MASTER:

Q. Was it during the war?

A. Yes, sir.

21. Now, state whether that was because the fence was rotted down.

A. Yes, sir; I got privilege to get some of it myself; it went all down.

22. It was not occupied at that time?

237 A. No, sir.

23. What was the building that stood by the road?

A. I don't remember exactly. I remember Lee Turney taking me over there as I was going home. He said he had put it so as to cover two sections on both sides of the line. It was an upright plank house at that time, with two rooms. It must have been about 14 or 16 feet. He went up with me. I do not know why he was talking to me about the house.

24. It was an upright plank house?

A. Yes, sir; that is what I think it was at that time.

25. Did you hear Mr. Cooper's testimony this afternoon?

A. Yes, sir.

26. Did you hear his description of the house?

A. I don't remember now.

27. He called it a shanty?

A. Yes, sir; I would call it that.

28. Does our description of it agree with his?

A. I don't remember what his was. I would call it a cheap building.

29. You think it was about 14-by-16-foot house?

A. I don't remember; but that is what I suppose it was.

238 30. Can you give an idea of about how much lumber it would take?

A. I suppose I could estimate it; but I don't remember exactly what the size of it was.

31. What was the condition of the land at that time around there?

A. It was all open.

32. Had it any rental value at that time?

A. If it had been fenced it would have had. I had my stock running all over it at that time, in '63.

33. If it had any rental value state it.

A. I don't know that there was any rental value. When not enclosed it was open commons—public land where stock was running.

Cross-examination by Mr. HANNA:

Q. You state that Turney had made some timber on it. That was several years before the war?

A. Yes, sir; in '56, I think.

2. That was the time that Turney put his mill on it?
A. Yes, sir.
3. He cut none after that?
A. No, sir; he said the timber was too rough and he had to quit.
4. Do you remember of any timber being cut there in '74 & '5?
A. I don't remember the dates. There was some cut there,
239 as I remember some persons hauling saw logs off of it.
5. Who did you see?
A. Snyder.
6. Did you see Alexander Johnson?
A. I don't remember him.
7. Do you remember Charley Wooton?
A. I think I saw him hauling to Saylor's mill.
8. Do you remember John Geddis and old man Woodworth, too?
A. I remember them hauling. I don't know where they got them.
8. That house you spoke of was the house Powell lives in now?
A. I don't remember now.
10. Do you remember when Slocum had it in wheat?
A. I remember something of that.
11. Do you remember the kind of crop was put in it in '63?
A. I don't remember the date. I remember Slocum had some wheat on it.
12. How much wheat had he?
A. I don't remember.
13. Do you remember what year that was?
A. No, sir; I can't remember.
240 14. Do you remember what year Turney left here and went to Washington Territory?
A. I suppose he went about '61.
15. Now, do you remember the condition of the land in '64. Was it used or not? Didn't John Cash have corn on it in '64–'5?
A. No, sir; I don't remember.
16. Do you remember of John Cash having corn in it at any time?
A. No, sir; I don't remember of it.
17. Do you remember of Baker working it?
A. I saw them on it; I have seen various people on it. The last I remember was when Wooton had it before he went away.
18. Who after that?
A. I don't remember much after that.
19. Do you remember anything of corn being raised there in '65?
A. No, sir; I don't remember.
20. Do you remember of Wooton having corn in it?
A. No, sir; I don't know what he had.
21. Wooton and Cash are dead?
A. Yes, sir.

Re-examination:

Q. If the persons mentioned had cultivated it wouldn't you have remembered them?

241 A. No, sir; I might have forgotten it in that length of time.

2. You might have remembered?

A. Yes, sir; and might forget it, too. I don't put much in my memory except my own affairs.

3. Might not this hauling of which you have spoken been on George's land?

A. Yes, sir.

By Mr. HANNA:

Q. You don't say those logs were hauled off of George's land?

A. No, sir; I never saw any of the logs loaded on the land, as I remember of.

Testimony of Wm. Whittaker.

WILLIAM WHITAKER, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. State your name, age, and residence.

A. William Whitaker; age, sixty-eight; live about two miles north of town.

2. Are you acquainted with these lands spoken of as the Turney and Slevin lands?

A. Yes, sir.

3. How long have you known those lands?

A. All of thirty years, I think.

4. Speaking now of the lands on the west side of the road in section thirty-six, what is that [the] character of that land?

A. Generally prairie; some of it is in timber.

242 5. What proportion?

A. I have no idea. The timber is in irregular shape.

6. What is the character of that which is apparently timber?

A. I never considered there was a great deal of good timber on it.

7. Have you been over the land?

A. Been over it some.

8. During the last twenty years?

A. Not very much in the last twenty years.

8. State whether in passing over that land you ever saw any log timber or rail timber on it.

A. No, sir; I don't remember of seeing any while I was over the land.

9. What would you say would be the diameter of the trees up to 1876?

A. There might be some few trees of two feet, but the timber was generally smaller.

10. Are those trees standing there now?

A. May be some few standing there yet.

11. What number of trees that you noticed standing there twenty years ago have been removed?

A. I have no idea.

12. Could you say one or more?

243 A. I have no idea of the number that's left or that has been taken.

13. Would you say that any considerable number of trees have been taken?

A. I couldn't say. I never was there while any logs were taken off.

14. During the time you have known this land what has been its condition as to being fenced up or in common?

A. During the greater part of the time it was in common.

15. For how many years past during or after the war?

A. I don't know how many.

16. Do you remember seeing any buildings upon the land?

A. There was one building down in the southeast corner that stood on the land. I never was in it. I have been alongside of it. I have mighty little recollection of it.

17. Was it of so impressing an appearance that it made no impression?

A. It made some.

18. I will ask you, Mr. Whitaker, if the land as you knew it, lying out in public common, had any rentable value at all?

A. I don't know that it had, particularly.

244 19. Was there any demand here for such land to rent?

A. Not that I know of.

Cross-examination by Mr. HANNA:

Q. You don't know anything about how much timber has been taken off that land?

A. No, sir.

2. Nor who did the cutting?

A. No, sir.

3. Don't know how much or when it was taken?

A. No, sir.

4. The land might have been rented if it had been under fence?

A. Yes, sir.

5. You don't know when the fences were taken down or when they were put up again?

A. No, sir.

6. And you don't know much about it?

A. No, sir.

Testimony of L. J. Rider.

L. J. RYDER, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. Give your name, age, and residence.

A. L. J. Ryder; live in town, and am 47 years old.

2. Are you acquainted with the lands adjoining Fairfield and known as the Slevin lands?

245 A. Yes, sir.

3. Can you say how long you have known them?

A. Ever since about, say, the last thirty years.

4. What is the character of the lands?

A. Partly prairie and partly brush timber on the east side.

5. What is the character of the timber land on those tracks [tracts]?

A. We would call it just brush timber. There is a little timber, but more brush than timber.

6. State whether or not any considerable portion of that is log timber or rail timber.

A. Might be some; not a great deal; some, of course.

7. Do you remember the situation of the east line in '63?

A. I think they were thrown out in commons in '63 or '64; they were thrown out into commons, but I wouldn't be certain as to the year.

8. They then became commons, and whole public passed over it?

A. Yes, sir; the fences was down and they was open.

9. Is it not true, Mr. Ryder, that during that time the public generally went over the lands and cut brush and timber on it or what they wanted?

246 A. I don't know as to the timber being cut.

10. Don't you know of timber being cut off at that time?

A. I don't know when it was cut. I have seen the stumps there.

11. You live where?

A. In town now.

12. In sixty-three where were you living?

A. On the other side of it; two or three miles from here.

13. During that time was there any considerable amount of that timber land suitable for saw logs?

A. I don't think anything to amount *to amount* to anything; wouldn't think they would cut saw logs; think it was all knotty. Good saw logs should be without knots.

14. Do you know of any timber being cut in '74?

A. Don't know where they came from; some were hauled to the mill.

15. Don't you know they came from George's land?

A. They came from that way.

16. Were you at that time through that portion of the land?

247 A. Not through the timber. I was passing backwards and forwards, but not through the timber.

17. Is there any difference in the value of such timber as you observed and good timber for saw logs?

A. I should think so.

18. Was this timber suitable for saw logs?

A. They might have cut one log off of a tree, but not many. I have been all through that land, and there is no good timber on it.

19. What is the value of good saw timber?

A. Depends upon what it is and where it is. I don't know what there [they are] paying now.

20. You have no idea of the value of it?

A. I don't know what there [they are] paying.

21. Have you any idea of the value of such knotty timber as that of which you spoke?

A. It is not as valuable as very good timber.

22. You say from '63 it was in commons?

A. Yes, sir; I think that's the time.

23. State whether such land as that had a rentable value.

A. No, sir; not without a fence.

24. Could such lands as those commons be rented?

A. No, sir; not without a fence around it.

25. And that fence disappeared in '63?

A. I think that's the time; I couldn't be positive.

248 26. Was that the time they ceased to be known as the Turney land- and commenced to be known as the Slevin lands?

A. I don't know when they ceased to be known so.

27. Don't you know that was about the time Slevins obtained title to those lands under legal proceedings here in town?

A. No, sir.

Cross-examination by Mr. HANNA:

Q. What would be a fair value for those lands under fence?

A. Lands were renting at that time, good land, for two dollars per acre.

2. You don't remember when the fence was taken down?

A. No, sir. I don't know when.

3. Was it not in '66?

A. I don't think it was, because I moved to town in '67, and I think it was taken off or thrown open before that.

4. Before '67?

A. Yes; I know it was.

5. Do you remember when John Cash died?

A. I think I do.

6. Do you know the year?

249 A. No, sir.

7. Was it before or after you moved to town?

A. Yes, sir.

8. How long?

A. I don't know.

9. Didn't he die in '66 and didn't he have corn in then?

A. I don't think he did, for he was hanging around here for a long time before that; don't think he tended to any corn in '66.

10. Did he in '65?

A. I don't think there was any fence there in '66.

11. Who attended to it in '64–'5?

A. I don't know.

12. While under fence you think it would rent for two dollars per acre?

A. What is cultivable.

13. How much is in timber and brush—eighty acres?

A. More than that.

14. That would leave two hundred acres for cultivation?

A. I don't know what it would be.

15. How much would you estimate was under cultivation and susceptible of cultivation?

A. The enclosed part was never farmed, as I recollect, till Mr. Nicholls took it.

250 16. How much was susceptible of cultivation when all under fence, taking Holmes' forty and all of the section, the three hundred and forty acres; the Holmes forty was all under cultivation?

A. I think so.

17. Now, of the east half of 36, how much was susceptible of it?

A. I wouldn't rent it for two dollars an acre, as there must be one hundred acres of brush there.

18. That would leave two hundred and twenty acres?

A. Yes.

19. What condition was that in — regard to fence?

A. I don't know.

20. Turney left for Washington Territory as secretary in '61?

A. I think that was the time.

21. How much was then in co-dition for cultivation, including the Holmes forty and the Ryder forty; was it all under fence?

A. I don't know whether it was all under fence then or not.

22. How much was under fence?

A. The Holmes tract was fenced around.

251 23. How much of it could be cultivated?

A. Never half of it could be cultivated.

24. As much as twenty acres of that forty?

A. Not over fifteen acres; there is not forty acres there in the Ryder tract; there's only thirty-seven acres and a fraction.

25. You think not to exceed half of it?

A. I don't think over fifteen acres.

26. Was it all under fence?

A. Yes, sir.

27. Would it have rented for pasture?

A. Yes, sir.

28. There is good pasturage along the creek?

A. Yes, sir; it is brushy along there.

29. Was there ever any house on that forty of yours?

A. Yes, sir; a little log shanty.

30. Do you know what year it was moved off?

A. No, sir; there was an old log cabin there, and I don't remember when it was moved off.

31. Do you know who ever lived in it?

A. No, sir.

32. You couldn't state how many logs were taken off the land?

A. No; I could not.

252 Re-examination by Mr. CONKLING:

Q. Did I ask you about the houses on that land?

A. No, sir.

2. Do you remember of any buildings being on that land?

A. Yes, sir.

3. Do you know of one on the south part by the line?

A. There was a little house boarded up and down; they moved it to town and added two rooms to it.

4. Could you attach any value to it; if so, how much?

A. Not very much.

5. Could that building when there have rented for eight dollars per month?

A. You might have got somebody to promise that, but I don't think they would ever have paid it.

6. Was the rental value of that house from then till now eight dollars per month?

A. I don't think it ever rented for that or half of it.

7. Do you know of any other buildings there?

A. There was a little log cabin on my place and above that a little frame house.

253 8. What became of them?

A. I don't know; they went like the fence.

9. Time stole them?

A. Yes, sir.

Testimony of E. S. Black.

E. S. BLACK, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. Give your name, age, and place of residence.

A. E. S. Black; fifty years old; live in Fairfield, Ills.

2. Are you acquainted with the lands spoken of here, known formerly as the Turney lands and now as the Slevin lands?

A. I know the tract that lies west of the township line along there for half a mile.

3. How long have you known that?

A. Ever since I was — boy. I was raised here.

4. Speaking of the land set down as two hundred and eighty acres, what is the character of that as to timber and prairie?

A. Mostly prairie. There's two draws of brush and small timber ever since I have known it. It runs up to Holmes' and on the northeast corner joins the township line. There's a larger piece of timber there and there are some large trees there—post oak, if I re-

254 member—and there — brushy runts, but some large trees.

5. What were the character of such trees for saw timber?

A. I would call them very poor.

6. Why?

A. Because *there* [they are] scrubby timber.

7. Do you mean knotty?

A. Post-oak timber is short, knotty timber. I don't remember seeing any white-oak timber there; there might have been.

8. You may state whether there was any considerable number of trees on that land that were suitable for saw logs or rails.

A. I would call it small brush and not suitable for that.

9. Would you say that fifty or one hundred saw logs could be taken off of that; do you know of any taken off?

A. I know that Turney put a saw-mill close up to that land and it didn't amount to much. I don't know whether he cut very much timber or not, or whether he cut on the west or east side. I don't remember.

10. Between '72 & '4 do you know of any timber being taken off of that land?

A. I don't know of any.

255 11. Would you have known if it was taken off?

A. I have been through it a great many times. I don't remember of seeing it cut or noticed the stumps much. I am speaking of west of the township line.

12. Do you remember seeing any building of any character on this land?

A. I remember seeing that little box-house there; it was put there when they had a difficulty about holding possession.

13. Put there by whom?

A. I don't know. My understanding is that it was Turney.

14. About what time?

A. I don't know.

15. Would you attach any value to that building?

A. My recollection is that it was a small box-house. I don't know the value of it.

16. Can you put any value in dollars and cents on it?

A. Yes, sir; as I think of it now, it wouldn't cost one hundred dollars to put it there.

17. Do you know what became of it?

A. No, sir.

256 18. Do you know what has been the character of the possession of that land; has it been open to the public or any individual since '63?

A. The last few years it has been fenced in and farmed.

19. Go back to sixty-three.

A. I can't say at what time it was thrown open. Turney fenced it first to put in wheat one season, and for a year or two some corn was put in. The fence kept coming down. On the west line there was a post and split lath fence made first on the west and south. I don't know the time it disappeared, but I know it went down. I don't remember when it was farmed after that.

20. Is it not true that originally no substantial fence was put on that ground?

A. No substantial fence, but there was some fence.

21. And it disappeared because of the transient nature of it?

A. No one kept it up.

22. When was it abandoned?

A. I don't remember; it was between '55 and '60 that Turney undertook to farm it. I couldn't tell just when.

23. After it ceased to be enclosed land had it any rentable value; if so, what?

257 A. I should say not; not valuable for renting without a fence.

24. Do you consider it had any rentable value?

A. I couldn't say as to that; I don't know. The last three or four years it has been farmed and rented some.

25. Has that been by reason of its being fenced?

A. Yes, sir; it has been fenced.

26. But not before that, if I understand you?

A. No, sir; not before this fencing.

Cross examination by Mr. HANNA:

Q. I will ask you this: That mill you spoke of Turney having there, was that before the war?

A. Yes, sir.

2. Did Turney take any timber off that land after he had been to Oregon?

A. No, sir; not that I remember of.

3. Do you know of any one taking timber off of it?

A. No, sir.

4. You don't know when the fencing went down so they couldn't crop any more?

A. I couldn't say.

5. Do you remember of Slocum having wheat in there?

258 A. I don't remember. I remember of Turney putting in wheat. I do not know how many acres.

Re-examination by Mr. CONKLING:

Q. At the time that fence went down, and they ceased to be enclosed lands, what was the rentable value of such land at that time—in '63 & '64?

A. I wouldn't suppose they had any renting value at that time with the fences down.

2. Just before that what would such lands rent for with such fences to protect the crops in '63 & '64?

A. I couldn't say. They didn't rent lands at cash rental; they rented at one-third the crop.

3. And they might run a man in debt?

A. That's my experience.

4. And you think it would cost more than it would rent for to keep it in fence?

A. Yes, sir.

By the MASTER:

Q. Taking such a tract of land as this, if it was not enclosed, was it possible to get a man to take it and have him enclose it?

A. You might have gotten a man by giving him a lease for a term of years—two or three years, according to the agree-

259 ment to put it in condition—and let him have all he raised on it.

5. After that it would have a cash value or a portion of the crop?

A. Yes, sir; sometimes they ask two fifty an acre right out.

Testimony of L. J. Rider, "Recalled."

L. J. RYDER, recalled, testified, viz:

By Mr. HANNA:

Q. What year did you take possession of the forty acres you bought of Slevin—first possession of it?
A. I think I first put a fence around it or part of it in '69 or '70.
2. Have you had possession of it ever since?
A. Yes, sir; I first fenced off a hog lot.
3. And you have been paying the taxes on it since '69 or '70?
A. No, sir; not until we bought it.
4. Who put you in possession of it?
A. The Slevins.

Objected to by Mr. Conkling.

A. (Continued). We got permission from Mr. Beecher when he was acting as agent for it, as we understood it. I think we did pay the taxes on it. I wouldn't be positive of it.
260 5. Was that in '69?
A. Yes, sir.
6. Who did you get possession of?
A. Charley Beecher; he gave us the privilege of fencing it in.
7. Who was he acting for?
A. The Slevins; as we understood it.
8. Did he tell you who owned it?
A. We understood the Slevins owned it.
9. And you have had possession of it ever since?
A. Yes, sir.
10. And afterwards you bought the land?
A. Yes, sir; we have had it about five years.
11. You live in sight of all this land?
A. We can see all of it from the mill. I don't know whether we could see it from the house.
12. What do you say about seeing timber taken off of it?
A. Have never seen any cut off or any hauled off.

Cross-examination by Mr. CONKLING:

Q. You have answered that you have lived in sight of all of this land?
A. Yes, sir.
2. And you have not observed any timber taken off of this land?
A. Yes, sir.
261 3. That is your answer?
A. Yes, sir.
4. It appears that Mr. Ryder has paid $17.00 taxes for one year. Now, if you have paid any more, I would like to know how much?
A. I wouldn't say how much we have paid without seeing the receipts.
5. I want you to explain the statement you made to Mr. Hanna, when you said you were put into possession.

A. Charley Beecher said we could take possession of the brush for a hog lot.

By Mr. HANNA:

Q. Did you take it?
A. Yes, sir.
6. He just said that you could take it for a hog lot?
A. Yes, sir.
7. Have you paid over $17.00 taxes?
A. I couldn't say I have.
8. And that land had no rental?
A. Yes, sir; two dollars for good land when fenced.

Testimony of John Rankin.

JOHN RANKIN, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. Give your name, age, and residence to the reporter.
A. John Rankin; age, 65, and live in Fairfield.
262 2. Are you acquainted with the lands known around here as the Slevin land?
A. Yes, sir.
3. How long have you known those lands?
A. Very near thirty years now.
4. Where do you reside as to those lands?
A. Near them; over north of town here.
5. Are you acquainted with those lands?
A. Yes, sir; I have seen them ever since I have been here.
6. What is the character of those lands as to being prairie or timber?
A. Mostly prairie; some timber on them.
7. What is the character of so much of them as would be called timber?
A. I don't know; it is very good land; the timber not very good that was on it.
8. What do you mean by not being very good?
A. Scrubby timber.
9. All or part?
A. There — some good trees on it; a few.
10. Now?
A. Guess there's some there yet.
11. Do you know of any cutting being done on the land; if so, when and by whom?
A. I don't know anything about that; never saw anybody cutting there at all.
263 12. Have you passed over and through the timber?
A. Yes, sir; passed over it several times.
13. Did you pass over it in '74 & '75 & '76?
A. Don't think I did.

14. At any time during your acquaintance with that land was there any saw-log timber or rail timber on it?

A. Might be a few logs on it; more brush. They had a saw-mill on it for awhile.

15. When?

A. About '55 or '56, maybe.

16. That was while it was owned by Turney?

A. Yes, sir.

17. Has there been any of that kind of timber on it since then that is not on it now?

A. There is some of that timber there yet.

18. Do you know of any of that kind of timber on it at any time that is not on it now?

A. No, sir. (This witness is slightly deaf.)

19. What is the character of that land as to occupancy or what was it before Adams fenced it up?

A. Open prairie; no fence around it at all.

20. For how long a time was that the case?

A. Couldn't say how long now; there was a fence around it all once.

21. Do you remember when that fence ceased to be around it; do you remember the year?

264 A. No, sir; I don't know the year.

22. Do you remember the character of the improvements that was on it and which disappeared?

A. No, sir; I don't. There was a house down in the southeast corner of it at one time?

23. At what time was that?

A. Nearly '55 or '56; I ain't sure.

24. Do you remember of any building being on it since then?

A. There is one on it now?

25. Where at?

A. Near the Holmes land.

26. When was that put there?

A. I think the one I speak of was a log-house down here on the southeast end of the land.

27. A log building?

A. Yes, sir.

28. What do you mean by a log building?

A. Just a house built of logs.

29. A square log house?

A. Yes; some were hewed and some round logs.

30. The witnesses have spoken of a plank up and down house. Do you mean that?

A. No, sir; I think this was a log house. I think there was a plank house still further down; it stood there awhile, and I don't know what became of it.

265 31. What was that worth? Was it a house?

A. It was just a shanty, and worthless.

32. How much?

A. I couldn't say; I don't know.

33. Was it because it was worth so much or so little that it troubles you to estimate it?

A. Well, I suppose it was worth something.

34. Was it worth fifty dollars?

A. I expect fifty dollars would cover it.

35. How many rooms were in it?

A. Just one room.

36. What became of it?

A. I don't know where it went to; don't remember anything about that at all; don't know what became of it.

37. Anybody live in it?

A. Yes; somebody was living in it then.

38. How long did they continue to live in it?

A. I don't know how long they lived in it.

39. What was the condition of the land from in '63 to '65, when the fences went down?

A. I don't recollect now.

40. Was there any demand for any such land as that?

A. No; not without a fence about it.

266 Cross-examination by Mr. HANNA:

Q. Now, with reference to this plank house you speak of, where was that house?

A. Do you know where I live? Well, it stood in the next block to me.

2. Was it in the town?

A. It stood right out there.

3. Who lived in it?

A. I think Othie Heber.

4. Was it on the Slevin land?

A. Yes, sir; I think it was.

5. Who built it?

A. Lee Turney, I think.

6. Do you know who took it away?

A. No, sir; I do not.

7. Was it taken away as early as 1870?

A. I don't know.

8. And you don't know what year it was put there?

A. No, sir.

9. How many houses have — on that land since you knew it?

A. I think there was a third one; I think the furthest east one was burned down.

10. Was that a log house?

A. Yes, sir.

267 11. Who do you know of cultivating that land? Did John Cash cultivate it?

A. No, sir.

12. Did Wooton?

A. No, sir.

13. Did Wilkington?

A. No, sir.

14. Did Cuff Ridgway?
A. Either he or Lee Turney.
15. Did you say they cultivated it?
A. That was in '55, the first year I came to this country.
16. It was under cultivation then?
A. Yes, sir; my brother-in-law and he plowed up there.
17. What land did they plow on this tract?
A. That part next Holmes.
18. Who were they plowing for?
A. Lee Turney.
19. Was all the land under fence at that time?
A. I think there was a plank fence around all of it then.
20. Can you now state how long it continued to be cultivated—give us any idea?
A. No, sir.

268 Re-examination:

Q. If Mr. Cash, Mr. Wooton, and Mr. Wilkington ever cultivated that land you would have known it?
A. I don't know.
2. If three distinguished gentlemen like Mr. Cash, Mr. Wooton, and Mr. Somebody Else had cultivated that land wouldn't you have known it?
A. If they had been cultivating it that year I would, but not after that.
3. After '63?
A. I don't know anything about '63.
4. Were they such prominent individuals or so insignificant that you would have known whether they cultivated it or not?
A. No, sir; I do not.

The further taking of testimony is adjourned by the master until 7 o'clock same day and at same place.

269 *Testimony of James H. Nicholls.*

Jas. H. Nicholls, being first duly sworn, testified, viz:

Q. Give the master your name, age, and residence.
A. Jas. H. Nicholls; residence in Fairfield, and 37 years old last March.
2. Are you acquainted with the lands adjoining Fairfield, known as the Turney and Slevin land?
A. Yes, sir; I think I am.
3. How long have you known them?
A. Since I have been in the county. I think we came here in the fall of '64 or '65; I believe the latter.
4. What were the condition of those lands when you first knew them—under fence or in commons, open to the public?
A. Out on the commons. They had been fenced, and there was still some old fence around part of it when I came here, as near as I recollect.

5. Which part?

A. Only a few panels on the south part, as I recollect.

6. What do you say as to the character of the larger portion of the land; is it timber or prairie?

A. Mostly prairie.

270 7. What is the character of the remaining portion of it as to timber; what kind?

A. There are some pretty good trees on the part that lies next my father's farm; some pretty good timber there.

8. Do you know the condition of that timber in the years '72, '3, '4?

A. I don't know so very much about it then. I was only out there two years. After we moved here, and have been in town ever since.

9. During this period have you been familiar with the land?

A. I have been out there off and on ever since. I don't know very much about the timber.

10. What do you know of any timber being taken off the land?

A. I don't know anything about that.

11. Do you know whether any has been taken or not?

A. I know some of it has been cut.

12. About what time was it cut?

A. I don't recollect. I was through there squirrel hunting.

13. Is it not true that the timber has been trespassed upon by people generally rather than by any one specifically?

A. It might be that it was.

271 14. The whole public had access to it?

A. Yes, sir; the land was not fenced up.

15. What do you say of any buildings on the ground or any portion of it?

A. I don't recollect on [of] any improvements, only one house; it was a little house upon this part up here that was moved.

16. Was it on the line of the road?

A. Yes, sir; that is all the one I recollect of.

17. Give us a description of it.

A. It was a shanty; it was so long ago I don't recollect much about it.

18. Would you attach any value to it?

A. It was worth something.

19. Do you know who put it there?

A. I do not.

20. Do you know who took it away?

A. No, sir; only recollect of its being there.

21. Can't attach any value to it?

A. I expect it would be worth something; probably a hundred or a hundred and fifty dollars when built.

22. How large, probably?

A. I do not know.

23. What kind of a roof had it?

A. I do not know whether it was clapboard or shingle.

272 24. Did it have doors or windows in it?
A. I think it had.
25. Would you say that house was worth seven or eight hundred dollars?
A. No, sir; I don't think it was worth that much.
26. At the time you first saw this land, when it was unoccupied or vacant land, had it any rental value, as you first knew it?
A. I don't know; had no knowledge of the value of lands at that time. Of course it had some value.
27. Would you rent vacant and unoccupied land?
A. No, sir; not unless it was fenced.
28. That is what I mean. It had no fence?
A. No, sir.
29. Was that the only vacant and unoccupied land in this vicinity?
A. No, sir; there was lots of it then.
30. Was not most of the land around here vacant and unoccupied?
A. The bigger part of it.
31. That land, being unoccupied and vacant, then, had no more value than any other such land?
A. I should think not.

273 Cross-examination by Mr. HANNA:

Q. You say you came here in '65?
A. Yes, sir; the fall of '65.
2. Was not that in cultivation in '66—part of it—the year after you came here?
A. None of that towards our house.
3. The upper end was not, but this side of the creek, didn't that have a crop on it; was not John Cash cultivating part of that in corn?
A. I don't know. I recollect him, but not the cultivation.
4. Do you remember Baker?
A. Yes, sir.
5. Didn't he cultivate it?
A. He did up there somewhere, but I don't recollect where.
6. Did he have corn in it?
A. Yes, sir.
7. As late as '66?
A. Yes, sir; but not on the other side, as I remember of; that was up by the orchard.
8. Was it not on this side that John Cash cultivated?
A. It was up there some place.
9. In '66.
A. I don't know. I was not up there much then.
10. In going up and down to town you saw this land?
274 A. Yes, sir.
11. In the fall of '65 you came here and John Cash had corn there?
A. I saw he had corn somewhere.

12. What land is there up there that he could have had corn on. On one side it is bottom land, and your father's is on the side west of it. On the east is George's timber, and on this side the town. Was not this the only land on which he could have raised corn?

A. I don't know.

13. It was not on the bottom?

A. No, sir.

14. There is no land east of it but what was in timber?

A. If he had corn there it must have been there, but I didn't go around that way to town.

15. You spoke of a house there. Was that the house Albert Sloan lived in?

A. Yes, sir; where the road is now.

16. How many rooms was there in that house?

A. I think there was two rooms.

17. It was long enough to make two rooms.

A. Yes, sir.

18. How were rents here in this city?

A. Pretty high.

19. Could you get a room for less than six dollars?

275 A. Well, I had a little room with a pantry that we used to cook in for eight dollars.

20. From the time the R. R. was built up to the last few years has there been any vacant houses to rent?

A. Not many.

21. Every thing would rent?

A. Yes, sir.

22. No trouble to rent anything?

A. No, sir.

23. How would that rent?

A. Well, rents were tolerably high.

24. Would it rent for six dollars a month?

A. Yes, sir; if you couldn't get anywhere else to go. I had to go out on the prairie.

Re-examination by Mr. CONKLING:

Q. Would that house have had any rental value out there?

A. There was no road there then; the road was ordered afterwards.

2. Your estimate, then, was based on its being in an eligable place?

A. Yes, sir.

3. It was on the line of the road?

A. After the [they] opened the road.

276 4. Would such a house at that time have any rental value?

A. As much as any house placed out there.

5. Do you know how the house came there?

A. No, sir.

6. Do you know how it disappeared?

A. No, sir.

Testimony of Sam'l Linder.

SAMUEL LINDER, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. What is your name, age, residence, and occupation?
A. Samuel Linder; age, forty-two or three; live in Fairfield.
2. Are you the same Samuel Linder who, on the 3rd day of March, testified here?
A. Yes, sir; I suppose I am. I don't remember the dates.
3. Are you acquainted with J. and J. Slevin and Co.?
A. No, sir; I am not acquainted with them.
4. Were you acquainted with Leander J. R. Turney?
A. I was acquainted with him before he died.
5. What do you know about J. and J. Slevin and Company?
A. I don't know them.
277 6. Do you know whether they ever had an agent in Illinois or not?
A. Only just from hearsay; that is all.
7. From whom did you obtain that information?
A. Mr. Geddis told me so, and Mr. George told me he was agent for the land.
8. Any one else?
A. Yes, sir; a good many here said Beecher, George and Saylor were agents for the land.
9. Any one else?
A. I heard the Ryders so [say] so.
10. Any one else?
A. I don't remember; might have heard; I expect I have.
11. Can you give a description of the land?
A. Yes, sir; I think so.
12. Please describe it.
A. Well, part of it is in section six and part in section thirty-six; part is in Lambert town and part in Jasper town.
13. How far from Fairfield?
A. Right here, adjoining Fairfield, almost.
14. How long have you known that land?
A. I don't know just how long I have known it. I have known it a long time.
15. For how many years?
278 A. I have lived here off and on since '69; the fall of '79 I moved away and was gone six years and came back.
16. Who have had possession of that land?
A. I didn't know anybody had possession of it till the year '79 or 80, when Bob Adams got possession of it, and he has had it since then. Jas. George had possession of it before.
17. Nobody had possession of it up to '80, you say, and George had possession of it before that time?
A. George had possession of it before that time and Adams since.
18. Who had possession of it in '63?

A. Up to '63 I was away from here; went into the army. Before that Lee Turney had it. I don't know for how many years. He had a big field under cultivation.

19. Do you know of anybody taking possession of that land at any time?

A. Only just heresay. I don't know of it by myself.

20. If you ever stated anybody had possession of that land it was only on hearsay and not of your own knowledge?

A. Just hearsay.

279 21. You don't say that anybody had possession of it so far as your knowledge of it is concerned?

A. No, sir.

22. I see that you formerly swore that somebody did have possession of it?

A. Well, not anybody more than that I have said now.

23. If anybody had possession of it you didn't know it?

A. No, sir; only that.

24. If you said otherwise was it true or false?

Objected to by Mr. Hanna.

25. Did you ever cut any logs out of that timber?

A. Yes, sir.

26. How many?

A. I cut two hundred out of it in there.

27. On what land did you cut that?

A. On this land, section thirty-six.

28. On which side of the road?

A. The west side.

29. For whom?

A. John Geddis; he employed me.

30. On this land?

A. Yes, sir. He told me he had bought the timber. He had bought it of G. J. George.

31. Geddis said that?

A. Yes, sir.

280 32. Don't you know that those logs you cut were on the east side of the present road?

A. No, sir.

33. Did the road run through there at that time?

A. No, sir; no road there then.

34. Do you know where the line was at that time?

A. No, sir; not exactly.

35. Did you know at that time it was on this line?

A. That was my understanding; it was all the time.

36. Have you ascertained since that it was on the George land?

A. I ain't been there since. I passed through there some time in March or February of this year.

37. Why did you pass through it then?

A. I went out there to go over it.

38. Did you go for the purpose of ascertaining whether you had cut on this land or the other?

A. I went to see one bunch of timber; to see if it was on this land.

39. Did you ascertain if it was?

A. Yes, sir; up next to Mr. Nicholls' fence?

40. How far from the road going north and south?

A. Close by the road; not far from the road.

41. Would the stumps be perceptible from the road?

A. Yes, sir.

42. How many are there?

281 A. Five or six.

43. Where would the rest of them be?

A. That was the bunch I went to see particularly about.

44. How many saw logs were cut from that?

A. I couldn't tell you just how many I did cut.

45. Couldn't you form some idea?

A. I think I cut two or three logs from most of those trees.

46. What was the length of the logs?

A. Eight feet by 12 inches.

47. What would be the size of the trees?

A. I think they ran from 12 inches; that was our orders, not to cut anything that ran less than would square 12 inches at the end.

48. Would a log of 12 inches diameter square 12 inches?

A. No, sir; but that was our orders.

49. Where was the other bunch?

A. Several scattering along down through that strip of timber.

50. Near the fence?

A. Yes, sir.

51. Would all be perceptible from the fence?

A. No, sir.

52. How many?

A. I don't know.

282 53. Can't you give an idea?

A. I don't know.

54. Do you make your estimate from your recent examination?

A. No, sir; from the number of the logs.

55. When was that made?

A. When the logs were cut.

56. In what year was that made?

A. As well as I remember, in the fall of '75 or '76; can't remember which.

57. You observed that over ten years ago?

A. Yes, sir; I have it in my memorandum book. I just kept the book.

58. Who employed you to cut those logs?

A. John Geddis.

59. How did he pay you?

A. He paid me a cent an inch for chopping, measured at the little end every time. I cut down a tree and cut off a log; if it measured twelve inches I got twelve cents for it.

By Mr. HANNA:

Q. A long log would be twenty-four cents?
A. Yes, sir.
Q. That was the reason you kept the memorandum?
A. Yes, sir; to settle with him.
283 60. Have you stated now all you knew of who had possession of any of that land?
A. I believe so.
61. I believe you said that Mr. George had.
A. He claimed to have possession.
62. Anybody else?
A. Nobody but Adams in 1880. I helped fence it then. I think it was in 1880.
63. Do you know anything about what became of Turney?
A. He went away from here and died, I think.
64. He died away from here?
A. I think he died at Effingham.
65. Is that all you know about Turney?
A. I knew Turney all my life till the spring he went away from here.
66. He went away from here to Effingham county?
A. No, sir; he went West to Washington Territory when he first went from here. I believe he was appointed Governor or secretary or something just about the beginning of the war, and then I went into the army and was not back here any more until '69, or about '69.
67. From '61 to '69 you was not here at all?
A. I was here, too, on a furlough; then I was here, I think, in '66, but then I was not about town.
284 68. So you didn't know anything about this property from '61 to '69?
A. No, sir.
69. Do you know of the sale of any of this property to other parties, of your own knowledge?
A. Only just hearsay, that's all.
70. You know nothing of your own knowledge as to who had possession of it during that time, from '61 to '69?
A. No, sir.
71. Did you know anything more about it when your deposition was taken in last March than you do now?
A. No, sir.
72. What do you know about any buildings being on that land?
A. Well, I know there was buildings on it.
73. When?
A. Well, I guess somewhere in the fore part of '70—the beginning of '70; don't know what time. It may have been '72 or '73 there was a building on the land, and it stood there, maybe, two years, and it was moved off into town.
74. Who put that house there?

A. Lee Turney, was my understanding.

75. I want to know what you know, not what you heard.

285 A. I saw Lee Turney there at the house at work several times.

76. What year was that?

A. I don't remember the year; it might have been '72 or '73.

77. Put it where?

A. On the land where the road runs through, running north and south.

78. What kind of a house was it?

A. Well, a small frame house—box house. I think there were two rooms to it; and then Albert Sloan he bought it of somebody; don't remember whom, but I did at the time.

79. I want you to tell me what you know.

A. I know that Sloan moved the house.

80. Why do you say anybody bought it?

A. He told me so.

81. Who told you?

A. Albert Sloan said he had bought it, and he wanted me to help him move it. I was working on the R. R. and I seen him moving it.

82. What you know of the purchase of the house was derived from Sloan?

A. Yes, sir; he told me he had bought the house and he was going to move it.

83. How did he move it?

A. On blocks. He had some eight or ten men helping him.

286 84. Can you state the size of the house?

A. No, sir.

85. What was the motive power they used to move it?

A. By main strength; a good many were doing it; they had planks down and rollers on them.

86. Did you see them move it?

A. Yes, sir.

87. How many men?

A. Eight or ten; maybe more.

88. Who did you see moving it?

A. Albert Sloan.

89. Where was Turney?

A. At that time?

90. Yes.

A. I think he had gone away from here.

91. What do you know of that land in '75–'6?

A. Well, the house had been moved of by that time, '75–'6. I am sure they had, and Jas. George was having those rails and stakes made there at that time.

92. Where was he having them made?

A. He was having them made all along the land there on both sides of the line. I didn't make any rails.

93. How do you know any were made?

A. I was there and seen them making them.

287 94. Did you know where the line was in the winter of '75 & '6?

A. No, sir; I didn't know exactly where the line was.

95. It was along anywhere?

A. They surveyed it out and placed it soon afterwards and cleared out the road through there, and in '80 a wire fence was built. I helped to build that.

96. Is it or not true that those rails were taken out on the line of the road?

A. The rails were all moved before the road was opened. There were none of them where [there] when the road was opened.

97. You can't locate, then, just where the rails were from?

A. Yes, sir; they made the rails on both sides of the line.

98. That is as near as you can state it?

A. Yes.

99. Can you say who had those rails made?

A. They told me Jas. George was having them made.

100. You are not speaking of your own knowledge?

A. No, sir; only what they told me—that I could make a thousand if I wanted too.

101. Who told you so?

288 A. Jas. George.

102. On whose land?

A. His own he called it.

103. He owned land there?

A. Yes, sir; and he was agent for that.

104. Did he ask you to make them on the land he was agent for?

A. He said he didn't care which I made them from.

105. It's now far from the line?

A. Not a great ways; couldn't state just how far they did cut away.

106. What became of those rails?

A. I can't tell. I don't know; haven't any idea where they went to.

107. Were they stolen from the land?

A. No, sir; a fence was put up there; been moved since, and I don't know where it went.

108. In what capacity was George acting there?

A. He was fencing his own land, that lies right east of this.

109. He was engaged in fencing his own land?

A. Yes, sir.

289 Cross-examination by Mr. HANNA:

Q. You said in your former deposition that you had known Turney and Adams all your life.

A. I knew Turney all my life, but not Adams.

2. You say you didn't know the defendants?

A. No, sir.

3. How long had you known Turney?

A. Ever since I could remember.

4. And you cut two hundred saw logs in the winter of '75 or '6?
A. I can't remember which.
5. The reason you kept a memorandum was that you cut by the ft.?
A. Yes, sir.
6. Where was Geddis' mill?
A. Right across from where the Ryder mill is now.
7. Mr. George told you that he was agent for the land?
A. Yes, sir.
8. Where was George during the time these rails were being made?
A. Here. He was on the land sometimes.
9. Was he giving instructions about it?
A. Yes.
290 10. Were those saw logs cut and hauled in the night or day-time?
A. In the day-time.
11. And they were cut in the day-time?
A. Yes, sir.
12. And it was half a mile to the mill?
A. Yes.
13. He told you he was agent for the Slevins?
A. Yes.
14. Was he exercising acts of ownership over those lands?
A. Yes.
15. Who did he claim to be agent for?
A. If he ever said I don't remember.
16. And the timber that was sold was sold to Geddis?
A. Yes.
17. Were you cutting logs for Geddis?
A. Yes.
17½. And Geddis was hauling them to his mill?
A. Yes.
18. Who hauled those logs for him?
A. Henry Snyder some, Alex. Johnston some, and others hauled.
19. Who else cut logs?
A. Myerson cut some.
20. Didn't Fitzgerald cut some, or what did he do there?
291 A. He was making rails there on the land.
21. Do you know how many rails were made on that land since the road was cut so that you could know where the line was?
A. I never counted them.
22. Were there a good many?
A. Yes; a big lot were made.
23. State what kind of timber that was when you went in to chop.
A. I chopped post oaks; maybe people would call it white oak, but post oak and white oak are different timber.
24. Is there some of those left on the land yet?
A. I think a few saw logs could be cut yet.

25. Has not most of the valuable timber been cut off before Adams got possession—before you put up the fence for Adams?
A. Yes.
26. Was not most of that timber taken off before that?
A. Yes.
27. In what years were they taken off?
A. As well as I remember, it was from '74 to '76.
28. Where was it mostly taken to?
A. The saw logs were taken to Geddis' mill.
29. Where were the rails taken?
292 A. I think they were mostly put in the fence running north and south.
30. There is now a road between George and that land?
A. Yes.
31. How did Adams fence his side of the road?
A. With posts and wire.
32. How did George?
A. He had a post fence then.
33. He has put up a wire fence recently?
A. Yes, sir.
34. Where did the rails come from that made Adams' fence?
A. From both sides of the line.
35. What proportion of them came from the Slevins land?
A. I couldn't tell you; quite a good many came off that.
36. Do you know who made the rails put in that fence? Did Fitzgerald?
A. Yes, sir.
37. Did you see Williams making rails there?
A. Yes.
38. Who else?
A. Several; couldn't say who.
39. Mr. George was superintending it?
A. Yes; I see him there pretty often.
40. Did you see Joseph Williams making rails there?
293 A. Yes.
41. Did they make saw logs there?
A. Yes; and I saw Charlie Swansy also there.
42. Who was he working for?
A. Jas. George, I think.
43. Working by the month?
A. No, sir; I think he and Williams were cutting two or three thousand rails and stakes.
44. Had there been any saw logs taken off that tract before Geddis worked it for a year or two?
A. I don't know.
45. You don't know whether Saylor cut logs there or not?
A. No, sir; I worked for Saylor.
46. Don't know where he got his logs?
A. I know where he got part of them.
47. You knew Turney ever since you remember anybody?
A. Yes.

48. When did he go to Washington Territory?
A. I believe in the spring of '61.
49. When did you know of his again trying to get possession of that land—about what time? At the time these logs were being cut was he trying to get possession of that land?
A. He was trying to get possession of it before that.

294 Objected to by Mr. Conkling.

50. Who was trying to keep him out of possession of it? Was it Chas. Beecher and Jas. George?

Objected to by Mr. Conkling.

A. Yes, sir.
51. Do you know anything about Mr. Turney putting a house there?
A. Yes; he put up one.
52. Do you know about what year that was?
A. No; I do not, exactly. It was in '70, '1, '2, '3, or '4.
53. Do you know when Turney moved to Effingham county? When he gave up the land he moved to Edgewood, in Effingham county?
A. I think he moved in '76.
54. And never was back afterwards?
A. No.
55. How long was it before he died, if you heard of his death?
A. A good while.
56. Did Mr. George ever tell you anything about having sold any timber off of this land?
A. Nothing, only what he said he let Geddis have; said he let him have all he could make into saw logs.
57. Did he say how much Geddis paid him?
A. No.
58. He said he sold the timber to Geddis?
295 A. Yes.
59. George's land was not cleared at that time nor until after Adams and I cleared this?
A. No, sir.

Objected to by Mr. Conkling.

60. When was the George land cleared?
A. I was not here when it was cleared.
61. Where were you?
A. I was in Green county.
62. How long ago was that?
A. I believe I went from here in '80, in the fall.
62. Was it cleared up at that time?
A. No.
63. You helped to build the wire fence for Adams?
A. Yes.

64. That was on the east side?
A. Yes, sir.
65. Was it Sloan you saw moving this house off the Slevin land?
A. Yes.
66. Who was superintending it?
A. I don't know.
67. Whose rollers were used in moving it?
A. Bill Day's.
67. Did he use them there?
A. I don't know.
68. Do you know that his were in use here for several years?
296 A. Yes.
69. Can they move a large house on them?
A. Yes, sir; they have done it.
70. Have they moved houses here with them as large as 60 ft. & two stories?
A. Yes, sir.
71. On these same rollers?
A. I don't know whether on those or not.

By the MASTER:

Q. Where is the line between the George and the Turney lands?

By Mr. HANNA:

A. The center of the road.

By Mr. HANNA:

Q. When George built didn't he build on the line?
A. I don't know; I think on the east side of it.
2. How far?
A. I don't know; not a great ways; right close to the line.

Testimony of Sam'l Linder, "Recalled."

SAMUEL LINDER, recalled, testified, viz:

By Mr. CONKLING:

Q. When was your deposition taken?
A. It seems to me it was the 9th of March.
2. Where was it taken?
A. Right here.
3. Who was present?
A. Several; Dr. Henley and Mr. Hanna and three or four others; I don't know who they was.

By Mr. HANNA:

Q. They were all witness-?
297 A. Yes, sir.
2. Brought in as to-day?
A. Yes, sir.
4. Was Mr. George present?

A. Not that I remember of.
5. Was Albert Sloan present?
A. Yes, sir.
6. Was Amanda Gaston present?
A. No, sir.
7. Was Malinda Long?
A. Not while I was here.
8. Was Fitzgerald?
A. No, sir; not while I was here.
9. Was John Geddis here?
A. I think so.
10. Was Stewart here?
A. No, sir; I don't remember him.
11. Was Joseph Williams?
A. Yes, sir.
12. And Mr. Geddis?
A. Yes, sir.
13. Those witnesses and Mr. Hanna were present?
A. Yes, sir.
14. Were you here when Gaston's was taken or Stewart's?
A. No, sir.
15. Where was Fitzgerald?
298 A. I don't remember.
16. You were here as to-day; the witnesses were all in and out?
A. Yes, sir.
17. They were taken by the master in chancery, Mr. Hendley?
A. Yes.

By Mr. CONKLING:

Q. When was it?
A. As well as I remember, it was on the 9th.
Q. Who took this down?
A. Mr. Hendley.

Testimony of John Fitzgerrald.

JOHN FITZGERALD, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. What is your name, age, and residence?
A. John Fitzgerald; forty years old; live in Fairfield.
2. How long have you lived in Fairfield?
A. Been living here since I was married—16 years; been here, I think, fourteen years of that; but I have always been about here. I was born and raised here.
3. Are you acquainted with the lands that have been spoken of here to-night?
A. I know where it lies.
299 4. By what name is it known?
A. I think that Jas. George claims it now.
5. Anybody else?

A. I think Mr. Hanna claims it, if it is the land I made the rails on, on the west side of the road. I don't know whether Mr. Hanna claims it or not.

6. Is the land you made the rails on the land that George claims?

A. Yes, sir; he claimed it at that time when we were making rails.

7. Does he claim it now?

A. Yes; I think he does.

8. That is the land you say you made three or four hundred rails on?

A. That is the land he hired me to make the rails on. I know he has a piece lying this side of it.

9. Do you know where the county road runs?

A. I was on the west side of that.

10. Did he claim any other land there?

A. Not that I recollect of now.

11. Where does the land lie that is claimed by Mr. Hanna, west?

A. Yes, sir.

12. Who got you to cut those rails?

A. Mr. George.

300 13. Who for?

A. For him.

14. What did he want them for?

A. I don't know. I suppose for to make a fence; that is what they generally do with rails.

15. He didn't get you to make them for anybody else?

A. No, sir.

16. Did he get you to make them as George?

A. Yes, sir. I made them for him; my brother-in-law and I made them together; we made several thousand there together; then I got a job in the foundry, and my brother-in-law worked on, and I went to work in the factory.

17. Who is your brother-in-law?

A. Mr. Venable. He still worked on after that.

18. He made how many?

A. I don't recollect; but I guess some seven or eight hundred, or maybe more. I didn't work but a very short time. I believe I cut some cord wood—not very much though; I helped.

19. That all?

A. All I helped.

20. Didn't do anything else?

A. No, sir; I went to work in the factory.

21. Didn't do anything else?

A. Not in the way of chopping there.

301 22. Did George profess to be acting for anybody or only for himself?

A. Acting as agent for the Slevins, I think.

22½. Agent for the Slevins to do what?

A. For the land, I suppose.

23. Acting as agent for them to have this timber cut off?

A. He did that, or had it done.

24. What do you know about any saw logs being cut off that land?

A. I never cut any. They were cutting saw logs. I don't know who cut them. Mr. Linder here cut some. I saw him there.

25. What do you know of anybody having possession of that land?

A. Don't know that I know anything particular. There was not much under cultivation then.

26. What shape or condition was this land in—was it under fence?

A. Part of it was, and part in timber.

26½. What part?

A. The lower part.

27. During what year?

A. 1872 or '3, I believe, was when I was out there.

28. What part do you mean by this part?

A. The old part, just across the creek.

29. Down at this end?

302 A. Yes.

By the MASTER:

Q. Next town?

A. Yes, sir.

30. What do you know about that?

A. Not much.

31. Do you know who had the renting of that?

A. No, sir.

32. You don't know who had the renting of that part that was under cultivation?

A. No, sir.

33. Do you know, of your own knowledge, whether that was rented or not?

A. There was some corn in there.

34. Do you know, of your knowledge, whether that was rented or not?

A. No.

35. What do you know about this land in '65 & '66?

A. I don't know that I know anything about — in particular.

36. Was it part of the public common?

A. Yes.

37. Everybody was passing over it?

A. The road was running through it.

38. Was it fenced on each side of the road?

A. Not all fenced; partly fenced on the east side and partly
303 on the west side. There was an old road running north through it that turned and went west up by the Nicholls farm.

39. Everybody could drive through it?

A. Yes, sir; over the fields.

40. Didn't anybody that wanted to go and cut there?
A. I don't know that everybody did or not.
41. Were there any other lands situated as those?
A. Yes.
42. Open lots now as then?
A. Yes.
43. Have you told all you know now as to people trespassing on those lands?
A. Yes; I believe I have, as far as I can recollect.
44. If you recollect of anything else state it.
A. I don't know anything more about it.
45. Do you know anything about any houses on that land?
A. No, sir; I don't know anything about houses there.
46. When and under what circumstances was your deposition taken here before?
A. They were taken some time in March, I think; I don't remember the date.
47. Where?
A. Here, in this room.
304 48. Who was present?
A. Mr. Handley took them.
49. Who else was present?
A. Mr. Hanna.
50. Who else?
A. Nobody; that's all.

Cross-examination by Mr. HANNA:

Q. You say that you have lived around Fairfield nearly all your life?
A. Yes.
2. Did you ever live away from here?
A. No, sir; I lived down at — place for awhile.
3. How long have you known this land?
A. For a right smart of a while.
4. George employed you to make those rails?
A. Yes, sir.
5. Was he present when you made those rails?
A. Yes, sir.
6. Was it on the west side of the road?
A. Yes, sir.
Mr. Conkling objects to leading witness.
7. It was on the west side of that road?
A. Yes, sir; west of the new road.
8. Did he show you there where to cut?
A. I don't recollect whether he went round or not. He told me where to cut.
305 9. What amount of rails did you make for him?
A. Some eight hundred or a thousand.
10. Was your brother-in-law also engaged there?

A. Yes, sir; and after I left.
11. How long did he work?
A. Don't know.
12. You went to work in the bending factory?
A. Yes, sir.
13. How many cords of wood did you cut on that land?
A. Don't recollect but about two or three.
14. How many cords of wood did Venable cut?
A. I don't know.
15. Do you know what fence those rails were put in?
A. I guess in the new fence.
16. They put up a new fence there?
A. Yes.
17. How near did they build that fence to where they were cutting?
A. Not very far from it.
18. Who else was cutting timber at that time, if any one?
A. Samuel Linder was cutting logs there.
19. Who else?
306 A. Joseph Williams. I don't know who else, it has been so long ago, and I have paid no attention to it.
20. Have you been out there since that wire fence was put up, or did you go to examine it?
A. No; I have not been there for a long time.
21. What teams were hauling?
A. Snyder hauled some of it away.
22. Who else?
A. Alexander Johnson.
23. Who else?
A. That's all I remember.
24. Where were they hauling them to?
A. To the Geddis mill.
25. Was Geddis out there during any of the time?
A. Might have been.
26. Could you give any idea of the amount of saw logs taken away?
A. I don't know.
27. You don't know how many rails Venable cut?
A. I don't know.
28. How long did he work after you quit?
A. A good many days.
29. How many rails can you make a day of that kind of timber?
A. One hundred and fifty per day.
307 30. How many days did he work?
A. Couldn't state.
31. As well as you know.
A. As much as a week after I quit.
32. Would he make as many as a thousand rails a week?
A. Would if he worked hard enough at it.
33. With regard to the number of stakes, do you know whether he made stakes or not?

A. No; I don't know.

34. With regard to the number of logs, could you make any estimate of the number of logs you saw hauled off?

A. I didn't pay any attention; I just saw them hauling them.

35. What do you know of this land being under cultivation at any time?

A. It was not much under cultivation at that time.

36. Do you remember of John Cash having corn in it?

A. I don't know for certain; don't know that I remember.

Mr. Conkling objects to form of question as leading.

37. Did Mr. George tell you he was cutting as agent on that
308 land, and that he was acting as agent for it?

A. I don't think he did.

38. Did he tell you who the land belonged to?

A. No; he never told me who the land belonged to; he told me he was agent.

39. He claimed he was agent?

A. Yes.

40. Did he tell you who he was acting for?

A. I don't know that he did.

41. Do you remember when John Cash died?

A. I know the day.

42. Do you remember that he had corn in that land before he died?

A. I know he used part of it for pasture, but I don't know of the corn on it.

43. How long ago was that?

A. Along in '63 & '4.

44. Do you remember of Mr. Wooten having some of that in corn?

A. Yes.

45. Did you work that for him?

A. Yes.

46. What year did Wooton have that in corn?

A. Can't tell exactly what time it was.

47. How long before Cash died was it?

A. A good while before.

48. You worked on the land?

309 A. I cut the corn for Wooton there.

49. Did Cash have any corn there before he died?

A. Couldn't say.

50. Did you ever see Henry Baker there working for anybody or Albert Sloan?

A. No, sir.

51. You say Cash pastured cattle on that land?

A. Yes.

52. Did you work for Cash at that time?

A. Helped tend the cattle some.

53. On that land?

A. Yes.

54. Do you know who he had it rented from?

A. No, sir.
55. Did you ever hear George or Beecher or Saylor say?
A. No.
56. What did they feed with?
A. Don't know.
57. Was it with corn?
A. I don't remember; we had them down here on the creek.
58. Do you remember the year?
A. Some time in '64.
59. What year did he die?
A. Must have been in '65. I reckon it was somewhere
310 along there; some time before he died we had the cattle there.
60. Do you know anything about Wooton raising oats on it?
A. No.
61. Mr. Wooton was brother-in-law of Mr. Beecher?
A. Yes. I know he had corn, for I worked on it.
62. Did you ever do any other work for him?
A. I did in town.
63. Did Mr. Beecher live with him?
A. I believe he made his home there.
64. He had the land under cultivation?
A. Yes.
65. Did Beecher live with Wooton while Wooton had that land under cultivation?
A. I don't know.
66. Where did Beecher make his home?
A. He might have lived there.
67. Wooton married his sister?
A. Yes, sir.
68. Did you board with Wooton while you worked with him?
A. Yes; while I worked in town I did; but while I worked on the land I was at home. While I boarded with them I think Mr. Beecher did also.
69. Beecher was the brother-in-law of Wooton and Wooton had the land under cultivation?
311 A. Yes, sir.
70. Do you know how much of this land Cash had for pasture?
A. I do not; there was a right smart strip of it down this way. There used to be an old log stable down here that he kept the feed in.
71. You don't remember of Henry Baker working for Cash?
A. No, sir.
72. Has Mr. Ryder since had some of that land fenced up?
A. Yes, sir.
72½. That was some of the land that Wooten had oats in?
A. Don't know whether Wooton had oats.
73. Where was Wooton's corn land?
A. Back to the north of it.
74. You don't remember the year you worked the corn?

A. Not for certain.

Re-examination by Mr. CONKLING:

Q. When your deposition was taken the other day you say Hendley was taking it and Hanna was present?
A. Yes, sir.
2. Were they taken then as now?
312 A. Mr. Hendley asked me the questions.
3. Henley wrote them down and you subscribed to them?
A. Yes.
4. I will ask you if your answers, when given by you, were in reply to questions read you from this paper or from any other paper, or whether you answered the questions just as now?
A. He would ask me the questions and I answered them.

Recross-examination by Mr. CONKLING:

Q. Did they forget to have you sign them, and didn't you come back and sign them afterwards?
A. Yes, sir.

Re-examination by Mr. CONKLING:

Q. Was Mr. Linder present at the same time?
A. No, sir; nobody else.

313 *Testimony of Harvey T. Stewart.*

HARVEY T. STEWART, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. What is your name, age, and residence?
A. Harvey T. Stewart; age thirty-four; live in Fairfield.
2. What is your occupation?
A. A teacher.
3. Are you the same Stewart whose deposition was taken here on the third of March?
A. Yes, sir.
4. Who was present when they were taken?
A. Dr. Henley and Mr. Hanna.
5. Anybody else?
A. No, sir.
6. Did Mr. Hanna examine you?
A. No, sir; they told me to state the facts, and I gave them the answers.
7. Did Henley ask you the questions?
A. No, sir; only a few questions.
8. Were the questions read to you?
A. No, sir; none at all.
9. How did it come that you subscribed to the questions and answers?
A. I subscribed to the statement.

10. Who asked the questions?
314 A. Mr. Hanna. I first made a statement without any questions.

Cross-examination by Mr. HANNA:

Q. That deposition is all true?
A. Yes, sir.
2. After you had made the statement of facts the question — put to you?
A. Yes.
3. You made the statement and then he asked these questions as to what you knew about it?
A. Yes, sir.
4. State now what you know about this land.

Objected to by Mr. Conkling as not cross-examination.

5. Were these interrogatories read to you at the time your deposition was taken?
A. Very few questions were asked.
6. Read this deposition over and see if it is your deposition, as taken at that time.

Witness reads the deposition aloud and say-:

A. Yes, sir.
7. Is that the facts, as you want it to be?
A. Yes, sir.
8. Those are the facts as you wanted them to be?
A. There is one point I objected to at the time: "And G. J. George sent to the Slevins and got a written lease in duplicate signed
315 by the Slevins." I told them that I was not sure that was done. I don't know whether that was done or not.
9. Who did you tell him did sign it?
A. The Slevins' name was on it.

By Mr. CONKLING:

Q. Why did you sign that paper when you knew that was not true?
A. I supposed that was left out.
10. You don't know whether the signatures were made by the Slevins or not?
A. I got it from Jas. George. I objected to the positive statement that they signed it. Jas. George said he was agent and they sent it to him.
11. That is the only difference?
A. Yes, sir; I wished to explain that.

By Mr. CONKLING:

Q. You didn't know whether they sent it or not?
A. I know their names was to it, and Jas. George said they had sent it.

2. Was this written in reply to a written interrogatory or in answer to a verbal question from Mr. Hanna, and then your answer to such interrogatories written down?

A. Most of it was without any question about it.

3. How was your mind directed in that channel?

316 A. I met Mr. Hanna on the street and he asked me what I knew about it. I told him all I knew of it.

4. Then he wrote it down in this way.

A. No, sir; I came up here, and he said, Now, sit down and tell Mr. Henley all you know about that lease, and I did.

5. I do not know that you understand the distinction that I wish to make in my question. What I want to know is whether your answers were in direct response?

A. I told that — was not. I sat down and made the statement.

6. Did you reply to any question?

A. Very few questions were asked me.

7. And who asked you those questions?

A. Mr. Hanna.

8. Where?

A. In this room.

9. These answers were made to his questions?

A. Such as are answers to questions.

10. These answers were made to questions?

A. Yes, sir; he asked the questions from that and I answered.

Recross-examination by Mr. HANNA:

Q. These interrogatories—state your name, age, occupation, &c.—were asked you?

317 A. Yes, sir.

2. Just in that way?

A. Yes, sir.

3. Are you acquainted with the land in dispute?

A. I don't know.

4. Then they skipped down to Int. 10. You didn't know anything about the logs?

A. No, sir.

5. Then I turned down to the last int. about taking the building off and put that to you?

A. I think so.

The further taking of these depositions was adjourned by the master until to-morrow, at eight o'clock a. m.

Testimony of Oliver Holmes.

OLIVER HOLMES, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. Give the master your name, age, and occupation and residence.

A. Oliver Holmes; reside in Lamar township—call it Fairfield, though I am outside of the corporation; age, 46, and by oc-
318 cupation a farmer.

2. Are you acquainted with the lands adjoining Fairfield known as the Turney and Slevin lands?

A. They are known to me as the Slevin land. I have always known them as the Slevin land.

3. The lands in controversy here?

A. Yes, sir.

4. Are you the Mr. Holmes that purchased forty acres of that land?

A. Yes, sir.

5. Do you remember the date of the purchase?

A. It was in '71, '2, or '3—along there.

6. Are you acquainted with that section of the land in which your forty is situated, as to its being prairie or timber land?

A. Yes, sir.

7. Please state what that is.

A. It is known as prairie land, although there is a few trees along the branches, and on the northeast corner—you might say east of northeast—there is some scrubby timber, and that would be designated as timber land.

8. How long have you known that land?

A. Since the fall of '65.

9. State whether or not those lands, from the fall of '65 up
319 to the time that Adams fenced them, were unoccupied lands.

A. I think they were. I saw the lands before '65, but I was not acquainted with them till that time.

10. Since '65 they were unoccupied common lands, accessible to the public without restraint as far as the fencing was concerned?

A. Yes, sir; as I recollect it.

11. Describe the character of the lands that were not prairie land, such as were timber and brush, at the time you first knew it.

A. Well, there were those patches of land where there was timber, and it was pretty much brush around the outskirts; the timber is such as usually grows on the prairie, of low top and not much body to the tree.

12. Scrubby timber?

A. Yes, sir; might be very few trees of larger size.

13. I will ask you, Mr. Holmes, if it is not true that such timber land as there is there is not points that run out of the timber land on to the prairie?

A. Yes, sir; that on the east has a point of timber that runs out.

14. State how continuous these lands were to the timber land.

320 A. I think the timber land commences right across the road to the east of it.

15. Now, give your estimate, based upon your knowledge of this land, of the probable number of trees that would make rails and saw logs from the time you first knew it till '80.

A. Well, I think there was no saw-log timber on it, and for rail

timber there would be very few trees. Of course I never paid any particular attention as regards that; but my recollection is that there would not be very much saw-log timber on, if any; but I don't know about it.

16. Would it be possible for there to be such timber on that land and you not know it?

A. I think not. For this reason: Mr. Nicholls' folks live out there, and after they came we became well acquainted with them and have been ever since. When we went up there we used to go through that up by the timber. I think if there was any such timber I would have noticed it.

17. How does the Nicholls land lie with reference to the Slevin land?

A. Adjoining it on the north.

18. Mr. Holmes, were you acquainted with any of the houses or buildings that were on that land since '65?

321 A. Yes, sir; there was a building there. It was reported to me that it was put there by Lee Turney, and Albert Sloan occupied it. It was very close to where the road now runs; possibly right where it is. That was after I moved back on to my farm. It was since I owned land there.

19. Describe that building.

A. It was a one-roomed building, planked up and down with rough lumber. It was what I would call a box-house; one room with rough planks up and down.

20. If you know, state the object Mr. Turney had in putting it there.

A. He told me himself that he was going to take possession of the land. That was, he said, his object in putting up the building.

21. How long did that house remain there?

A. It was not there long; only a short time. The house mysteriously disappeared. I didn't see it taken away.

22. State whether or not that was on the land that Ryder bought on section six by the line of the county road.

A. No, sir; I think it was west of the line some distance.

322 23. Was not the object in putting it there to get possession of the large, as well as the forty-acre, tract?

A. I think it was on the large tract. There has been a good deal of improvement out there since, and possibly I might have located it farther west than it actually was at that time. The road was not laid out then, and it might have been on the line.

24. Turney stated to you that his object was to get possession of the land?

A. Yes, sir; said he wanted to get possession, and for that reason he was putting the house on it.

25. Can you fix some value on that house?

A. I don't know much about what such a building would cost; I suppose somewhere between thirty and fifty dollars; something like that.

26. State the size of it.

A. Something like 12 x 14 feet.

27. Outside dimensions?
A. Yes.
28. Do you know what became of that building after it was taken away?
A. No, sir; I don't.
323 29. Did you ever know of any building on those lands that would be worth from seven to eight hundred dollars, and that would rent for eight dollars a month?
A. No, sir.
30. If there had been such a building would you have noticed it?
A. Yes; I think I would.
31. How far is it from your residence?
A. Not a quarter — either way.
32. Do you have a continuous view from your residence and home of the place where that building was?
A. Yes, sir.
33. Could you see it any time you looked out your door?
A. Yes, sir.

Cross-examination by Mr. HANNA:

Q. Were you ever inside of that house?
A. No, sir.
2. You don't know much about it?
A. No, sir; but I have passed by it.
3. Ain't that a house of four rooms?
A. From the size I wouldn't say but one.
4. Wouldn't those who have lived in it have better opportunity of knowing?
A. Oh, yes; but I have passed by it and stopped and talked
324 to Sloan when he lived in it.
5. The house is the house that Powell lives in now?
A. I don't know.
6. Has there been any time when the house that Powell lives in wouldn't rent for eight dollars a month?
A. I don't know the Powell house.
7. You state that those who had been in the house and lived there would have better opportunity of knowing what it was?
A. Yes.
8. Didn't Harvey Stewart live in it?
A. I only knew it when Sloan lived in it.
9. And if Stewart lived in it you think he would know better than you?
A. Yes.
10. Mr. Nalley lived in —?
A. I think not.
11. Did Mrs. Richardson live there awhile?
A. I don't know.
12. They might have all lived there and you not know it?
A. I don't think they could.
13. Do you know whether there was an addition built to that after

it was built and before it was moved away—didn't Harvey
325 Stewart build a two-roomed addition?

A. I don't know of it.

14. Would his opportunities, if he lived there and you didn't, be better than yours; he lived there a year?

A. I don't think he lived there a year.

15. He swears that he did.

A. I don't think he did.

16. If he has sworn that he lived there a year under a written lease?

A. I don't think he lived there a year.

By Mr. CONKLING:

Q. State whether it is true or not.

A. I wouldn't say.

17. Wouldn't the men who have lived in the house have better opportunity of knowing the size of it than you, who had never been in it?

A. Well, I think I can look at a house and tell the size of it as well as if I was inside it.

18. Do you say that you could tell better than they?

A. I only give my judgment.

19. Do you know anything about John Geddis taking saw logs off that land, or of any being taken off; do you know of Sam'l Linder cutting two hundred saw logs there?

326 A. I don't know of anybody getting saw logs there. There might have been a few trees and me not know it, but I don't think there ever was enough trees there to make two hundred saw logs.

20. Well, there was four hundred saw logs taken off of it.

A. I wouldn't think there was.

21. If John Geddis says he got two hundred saw logs wouldn't he know better than you would?

A. Yes, sir.

22. Wouldn't Linder, if he cut them?

A. Yes, sir.

23. Wouldn't Alexander Johnson, if he hauled them?

A. Yes.

24. And wouldn't a man who cut or hauled the saw logs know better about that than a man who passed through it or by it?

A. I think I would know from passing by.

25. There is certainly sixty acres of timber there?

A. No, sir; don't think so.

26. How much timber and brush on that half section?

A. Not over five to ten acres.

27. And the balance of the three hundred and twenty acres in prairie?

A. Yes.

28. And that is all the timber?

327 A. There is some timber along the branches. I only speak of the east northeast.

29. That is eighty acres. How much of that's timber?
A. I would think there would be seventy acres not timber.
30. What is in it?
A. Prairie land. Been some crops in it; perhaps all of it; all of the east part of it, at any rate.
31. Is there any cleared on the north at all—the northeast of the forty?
A. May not be, but it is not all timber.
32. The timber runs almost from the R. R., and does not the R. R. run up to the corner?
A. Yes. I think the timber would extend out half way to the R. R.
33. That would be one-fourth of a mile?
A. No, sir; the railroad runs across the corner.
34. Does the R. R. run the whole mile?
A. No, sir.
35. Didn't the old road curvé around there because it couldn't run through the timber?
A. The timber skirted around that and the road turned back here again at the brush; the timber was at that little point there.

328 Re-examination by Mr. CONKLING:

Q. Mr. Hanna has asked you if such saw logs might not have been taken out there and you not know it in '74–'5?
A. I moved onto the land in '74–'5.
2. You have answered that it might be possible?
A. Yes.
3. Might it not be possible for them to kill a man on that land and you now [not] know of it?
A. Yes, sir.
4. Might it not be possible for a great many things to be done there and you not know about it?
A. Yes.
5. But do you mean to say that it was possible for that amount of logs to have been there or taken away and you not know it?
A. I don't think that was ever possible.
6. Could such timber as Mr. Hanna has spoken of have been there and you not know it?
A. A few saw logs might have been taken off and I not know it.
7. Could you have failed to notice it with the continuous view from your residence?
A. If they had been there I think I would have done so.
8. Does your house overlook that land?
329 A. Not upon that piece of timber.
9. I will ask you if such timber as has been specified had been there at the time mentioned wouldn't you have certainly known of it in passing by continuously?
A. I passed it by once a month at least.
10. Did you at that time see any such lumber there?
A. No, sir.

Recross-examination by Mr. HANNA:

Q. You never examined it?
A. I looked at it; didn't examine it particularly.
2. Didn't the railroad cut some off there? Did you notice that?
A. There was some cut on the R. R.; west of the R. R.; don't know who cut it.
3. They picked that clean, didn't they?
A. Don't know who did it.
4. Was it taken for R. R. purposes?
A. I don't know.

Re-examination by Mr. CONKLING:

Q. How near to the east line of this land does the timber on the east side of it begin to appear and on whose land is it to be seen?
A. Right across the line.
2. On whose land?
330 A. Jas. George's.
3. State whether or not a large quantity of timber has been cut from that.
A. I think there has.
4. Have you not seen that cut and taken away?
A. Yes.
5. Could you escape observing that fact?
A. Not within the last few year-.
6. Then if such timber as Mr. Hanna called your attention to, it has been taken from Mr. George's land?
A. I don't know anything about this ranch that he speaks of.

Mr. Hanna objects to Q. & A.

7. Does not George's land show that it has been cleared by the stumps remaining there?
A. Yes.
9. And the cleared condition of the land shows it has been cleared?
A. Yes, sir; you can see the stumps.
10. Does the Slevin land present such an appearance?
A. No, sir.

By Mr. HANNA:

Q. The Slevin land has not been cleared?
A. No, sir.
331 11. Does not the George land show that a large amount of timber has been cleared off it?

By the MASTER:

Q. When was the George land cleared; the earliest, if you know?
A. It is partially cleared up to the road. I don't know when it began.

12. From what date did he begin to cut his timber?

A. Well, I don't know from what date he began. He has been cutting some timber all the time, off and on; don't recollect the first. He has been at it several years.

13. Earlier than '80?

A. Yes; I think so.

14. How much?

A. Perhaps not long; don't know; but it was that much, I think.

15. What is your best recollection as to the time he began?

A. I would say as early as '80; but I do not recollect distinctly.

16. Do you recollect of his taking any timber off of his land so as to bring about the appearance that exists there now as early as '74, '5, & '6?

A. I would hardly think it was that early; but it might have been.

332 *Stipulation.*

If it does not appear in the record it is agreed by the parties hereto that the Ryder Bros. paid eight hundred dollars for the northwest northwest of 6, 2, 8, on or about July 26th, 1879.

Testimony of Rich'd Merriles.

RICHARD MERRILES, being first duly sworn, testified, viz:

By Mr. CONKLING:

Q. Give your name, age, residence, and occupation.

A. Richard Merriles; age, fifty-three; reside in Cincinnati, O.; my occupation is that of *of* agent for the Slevins, the trustees.

2. How long have you been acting as agent for the trustees?

A. Since July, '78.

3. State what has been the range of your official duties.

A. I have had full charge of their correspondence about deeds and settlements, and have attended to their business generally.

333 4. State whether you have examined all their papers and records with regard to Wayne county, particularly as — any property near Fairfield.

A. I have examined such papers carefully.

5. State what relation, if any, Mr. George sustained—G. J. George, of Fairfield—sustained to the firm of J. & J. Slevins or to their trustees.

A. He acted as agent for them in the payment of taxes. He sent a memorandum of the taxes when due; they would send him a check for the money.

6. Anything beyond that?

A. He also sent us offers once or twice for the property, and in one case we accepted an offer.

7. State whether or not he was agent to rent, cut, or sell any timber.

A. He had no authority to rent, to lease, or to do anything about

the land than the payment of the taxes and forward any that might be made for the sale of the land.

8. State whether or not he had any power conferred upon him to do any act as agent unless it was first ratified by them.

A. He had no authority from them or the trustees for that purpose.

9. Was any act done or performed by Mr. George, or his
334 firm of Beecher, George and Saylor, done by the authority of the Slevins or their trustees, unless it was first ratified by them?

A. Prior to '76 the Slevins were in business. In Dec., '75, they failed, and after the failure they finally went into bankruptcy in the early part of '76. Their final bankruptcy was in March; and on April 10th, 1876, the court appointed trustees, to whom deeds were made for the entire property, both personal and real, and everything passed under their control.

10. State whether or not all the official business of that company was not transacted and carried on by you.

A. All of it, from '78 to the present date. I came into the management at that time; took charge of the making of deeds, correspondence, &c., &c.; that wall [was] all in my hands.

11. Did you find any authority had been given to George prior to that time?

A. I carefully examined the old letter books and letters of the Slevins prior to that date in regard to the Slevin lands, and I didn't find any authority given to George, beyond the paying of taxes and receiving offers and forwarding them to the company, out-
335 side of the action taken in regard to the forcible detainer suit.

12. State how it was with reference to Beecher, George and Saylor.

A. Nor anything in relation to the firm of Beecher, George and Saylor, or George and Saylor.

13. Now, is there anything else you wish to state?

A. I don't know of anything else.

Cross-examination by Mr. HANNA:

Q. You had no charge until appointed agent for the trustees in '78?

A. No, sir.

2. You know nothing about the relation that Beecher, George and Saylor sustained until that time?

A. No; only what I learned from the papers.

3. You were not present when the forcible entry and detainer suit was commenced?

A. No, sir.

4. Who commenced that suit?

A. I noticed by the papers that it was commenced by George.

5. Who did he correspond with about it?

A. With the Slevins.

6. Did they pay him a fifty-dollar fee for putting Turney off?

336 A. They paid the costs. I have a letter here of Jan'y 25, '75, acknowledging receipt of the check for the costs.

7. In whose handwriting is that?

A. The handwriting of Mr. George.

8. I will ask you to put that in evidence.

A. I have it here.

9. That was the house that was sold for the purpose of getting Turney off that land?

A. We have no knowledge of the selling of that house, or beyond that it was something put there by Turney.

10. By whose authority was that taken off?

A. I have no knowledge beyond what I have stated.

11. You don't know what relation the attorneys sustained to the old firm of Slevins?

A. No, sir; I didn't go into it until afterwards.

Re-examination by Mr. CONKLING:

Q. You have stated that they acted as attorneys and lawyers to resist the attempted taking possession of this land by Turney.

A. That's my understanding, but it was prior to my connection with their affairs.

2. Were they employed as any other attorney might be?

A. I have no knowledge, excepting as stated.

337 The above completes the testimony taken on behalf of the Slevins by Mr. Conkling.

Testimony of Alex. Johnson for Complainants.

ALEX. JOHNSON, introduced on behalf of Adams *et al.*, sworn, and testified in answer to questions of Mr. HANNA, viz:

Q. State what you know about any logs being hauled off that Slevin land up here. Did you haul them off in the winter of '74–'5?

A. I don't recollect the date exactly. It was somewheres along about '73 or '74. I could refer back to my book and find out. I kept the logs I hauled in my book at that time.

2. How many did you haul?

A. Something between seventy and eighty. I hauled a couple of weeks.

3. State whether it was on the east side or the west side of that road.

A. The west side.

4. Who did you haul them for?

A. For John Geddis.

5. Where did you haul them to?

A. To the old mill. It has been burned down. It was near the new mill.

6. What kind of timber was it?
A. Post oak and white oak, and some few black oak.
7. Of what size?
338 A. From eighteen to twenty inches and from twenty-five to 30.
8. Across the little end?
A. Yes, sir.
9. Of what length?
A. Generally of twelve feet.
10. Do you know of anybody else hauling logs there?
A. Well, a man named Snyder was hauling some for Geddis.
11. Who was cutting?
A. Sam. Linder most of the time, and Joe Williams was cutting awhile.

Cross-examination by Mr. CONKLING:

Q. Are you speaking of your own knowledge or from hearsay?
A. No, sir; I hauled the logs myself for one or two weeks or two weeks and a half. I hauled a good many.
2. Mr. Geddis was committing the acts of a trespasser on the Slevin land?

Objected to by Mr. Hanna.

A. I don't know anything about that.
3. You hauled these logs for Mr. Geddis. You simply did the hauling?
A. Yes, sir.
339 4. When was that?
A. I think in '73 or '74.
5. Twelve or thirteen years ago?
A. Yes; I couldn't say which, positively.
6. How do you know those logs were hauled from the Slevin land?
A. I don't know whether they were hauled from the Slevin land.
7. How do you know it was on the west side of the road?
A. Because the road went winding through that timber.
8. Was the old road laid out as it is now?
A. No, sir.
9. Was the line run there?
A. No; I don't think it was.
10. How do you know it was on the west side?
A. It was.
11. Can you see the line on the land from here?
A. No, sir.
12. How far can you see an invisible line on that land?
A. I could see it for half a mile if I was looking up the line.
13. How do you know it was on the west side of the line?
A. I know it was west of where that line now runs.
340 14. But that was ten years ago?
A. Yes, sir.

15. So you know now where it was ten or twelve years ago?
A. Yes, sir.
16. Don't you know those logs were hauled from the George land?
A. No, sir; not the logs I hauled.
17. Wouldn't that land still show the remains of the trees—the stumps?
A. Yes; the stumps would be there.
18. Are the stumps there?
A. I guess they are.
19. Do you swear the stumps are there?
A. No.
20. If I say I was there yesterday and I failed to see any of the stumps, what would you say?
A. The stumps must be there if you look for them, and if you will go with me I will show you the stumps for every log I hauled.
21. Don't you know there is the remains of just such cuttings on the east side of the road?
A. Yes; George was cutting there a few years ago.
22. You haven't examined it lately?
341 A. I have been there, but haven't noticed the stumps. I cut wood there.

Re-examination by Mr. HANNA:

Q. Hasn't George's land been cut off since Mr. Adams fenced off his land? It was not cleared before, was it?
A. Not much that I know of.

Announcement.

The master announces that he will expect this case to be argued on Wednesday, the 22nd day of April, and announces that he will hear no testimony after Saturday, the 18th day of April; but that he will hear any testimony offered by either side up to that day.

342 Pursuant to the *to the* announcement of the master, made at Fairfield on April the 11th, the parties appeared before the master, at Springfield, on the 18th day of April, and Mr. Oliver Holmes, who was sworn and examined at Fairfield, made the following corrections and additions to his testimony:

Testimony of Oliver Holmes, 2d Examination.

By Mr. CONKLING:

Q. In your deposition taken the other day you stated that the amount of land in timber on the northeast tract of the Slevin land was from five to ten acres. Now, if you have any corrections to make, you may make them.
A. When I made that statement I had never given any thought to it. I didn't know I was going to be examined as to the timber land. I made the statement that I thought there was from five to ten acres; afterwards, upon thinking it over, I thought there was

more than that and didn't feel satisfied, so I went up and looked at it. I found I had been wrong. On such examination I found that on the east half of northeast there was as much as thirty to thirty-five acres.

2. Who went with you?

A. Mr. Merriles.

343 3. If you and Mr. Merriles made any examination as to the cutting of any character that had been done upon the land, state what that was and the character of it and the result of the examination.

A. He suggested as we went up that he would like to see what timber was cut off, and he just proposed that he would see the character of the stumps as we went over it, and we did.

4. State the result of that examination.

A. We went down from my land to the R. R. to the south part of that land—where there is a cut in the R. R., where there is a tres-le—and on the west side of that we found ten stumps; there might have been a few more, but we only found ten. That was all we could see prominently; about that number; I disremember exactly; I think there was four of pretty good size, and the balance were smaller.

5. State the entire examination.

A. We went on up to the other piece of land, on the northeast part of the tract where the thirty-five acres lies, and we went into that, taking a circular cut on the right-hand side of the branch up to the fence on the other side. Well, we counted, not includ-

344 ing the small stumps—we couldn't count the small stumps handily—we counted somewhere between sixty and seventy-five stumps from the size of, say, a foot across the top to, say, two and a half feet. I think that is about what it was according to the recollection I have now.

Cross-examination by Mr. ADAMS:

Q. You say that you went on to it through from your farm?

A. Yes, sir; at the forty right east of my house.

2. Don't you know there are three pieces of timber on that land?

A. Yes.

3. Do you say there is only thirty-five acres of timber on that land?

A. I said on the northeast portion.

4. Don't you know there are seventy-five acres altogether?

A. Yes, sir; about that.

5. What do you know about that road on the east side? How long has it been there?

A. It was opened somewhere about '80 or '81.

6. Did you go outside of the field to examine the stumps?

A. No, sir.

7. Don't you know there are quite a large number of

345 stumps out on the road?

A. Yes; a good many of them.

8. Don't you know there are several large logs cut down and now lying in the roadway? Isn't there a dozen large logs lying out there

now on the south piece of timber along the road there between the county road and the R. R.?

A. Didn't count those; didn't go in that piece.

9. Don't you know there's a large number of stumps there?

A. No, sir; didn't examine that; we went to the tres-le and up the hill.

10. Didn't go into the road to examine that?

A. No, sir.

11. You frequently travel over that road?

A. Yes.

12. Don't you know there — a large number of stumps in the road?

A. Yes.

13. There is 75 or 80 stumps and a large number of logs lying in the road on the northeast piece of timber?

A. There may be; didn't count them.

14. You state there is about seventy acres of timber, all told, on that land?

346 A. Yes, sir.

Testimony of Arch. Merriles, 2d Examination.

ARCHIBALD MERRILES, recalled, testified, viz:

By Mr. CONKLING:

Q. Are you the same gentleman that was examined the other day?

A. Yes, sir.

2. I would like to have you state with reference to the taxes during the past four or five years. You may state the amount of taxes paid for 1880.

A. The amount of taxes paid for 1880 was $31.76, and was paid on or about the 18th or 20th of April, 1881.

3. Now, state when you redeamed from the sale for taxes of 1881 and for 1882.

A. For 1881 & 1882 we paid $129.16, as shown by the certificate here submitted as an exhibit and marked "A."

4. How for 1883?

A. On January, 1884, it was paid and amounted to $36.05, as shown by certificate hereto attached and marked "Exhibit B."

5. For 1884?

347 A. They were paid in March, 1885, and amounted to $32.68. The certificate has been sent to Cincinnati.

It is admitted by the complainants in the cross-bill that they received the sum of $800.00 for the sale of the Ryder tract on August 18th, 1879.

6. You may state whether or not, Mr. Merriles, you have recently made any examination of the lands in controversy and the result of that examination.

A. Well, at the suggestion of Judge Hanna I went up to look at

the northeast corner of the land—the piece of timber land furthest east—to see the amount of cutting that had been done. I found fifty-six stumps, by actual count, from a foot in diameter up. There might have been a few more, but I made a pretty thorough examination, going back and forth over the land. I found one tree there, with the log that had been cut lying by the side of it; seemed to be quite recently cut; the chips were lying around, and it must have been cut within a few months. Some of the stumps, again, were quite old. There were a good many little sapplings of from four to five and six inches cut.

348 Cross-examination by Mr. ADAMS:

Q. When you examined this land you were in company with Mr. Holmes and counted with him?

A. Yes; I kept the tally.

2. You didn't examine the piece of timber on the south—the piece next the branch?

A. No; looked over into it, but didn't go in or through it.

3. And you weren't outside of the fence on the highway?

A. Was out, but didn't count the stumps. There is quite a large number of stumps there, outside of the enclosure, in the roadway alongside of the fence on the line.

4. You didn't count those outside?

A. No, sir; but there is quite a number of them.

By Mr. CONKLING:

Q. State whether or not those were made in opening the road.

A. I couldn't say; but they were between the two fences.

5. That was true of the whole length of the road, from fence to fence?

A. Most of them were in the upper end.

6. You are speaking now of the stumps made in opening the road?

A. Yes.

349 By Mr. ADAMS:

Q. You don't know when or who cut them, or whether they were made in opening the road or not?

A. No, sir; I don't know as to that.

2. And you don't mean to say they were cut for that purpose?

A. No, sir.

Finis.

350 *Exhibit "A" to Testimony of Arch. Merreles.*

Redemption certificate.

STATE OF ILLINOIS, }
Wayne County, } *ss:*

OFFICE OF THE CLERK
OF THE COUNTY COURT OF WAYNE COUNTY.

I, Joseph E. Wilson, clerk of the county court in and for said county, do hereby certify that trustees of J. & J. Slevin has [have] deposited in this office one hundred & twenty-eight & $\frac{91}{100}$ dollars for the redemption of the following-described premises, situate in said county and described as follows, to wit:

The N. E. qr., section 36, town. 1 S., R. 7 E., and the N. ½ S. E. qr., section 36, T. 1 S., R. 7 E., and the S. E. ¼ S. E. qr., section 36, T. 1 S., R. 7 E., 3rd P. M., which was sold J. G. Crews for the county, State, and other taxes, due and unpaid for the year 1881, on the twelfth day of July, A. D. 1882, by the county collector of said county.

Amount of sale	$45 39
50 per cent.	22 70
Subsequent taxes	60 32
Interest	50
Advertising fee	25
Total	$129 16

Given under my hand and the seal of said court, at my office, in Fairfield, this 18th day of April, 1883.

[SEAL.] JOSEPH E. WILSON,
Clerk of the County Court.

Exhibit "B" to Testimony of Arch. Merriles.

STATE OF ILLINOIS, }
Wayne County. }

No. 10.

TOWNSHIP COLLECTOR'S OFFICE TOWN. OF LAMARD, *January 14th.*

Received of E. Beecher, for trustees of J. & J. Slevin, thirty-six *dollars* & $\frac{8}{100}$ dollars in full for the following State county, town, road, bridge, and special and back taxes on the following-described real estate and on personal property due for the year 1883, to wit:

Subdivision of section, lot, or block.	Sec. or sub lot.	Town. or lot.	Range or block.	No. of acres.	Equalized value by State Bd.	State tax.	County tax.	Town tax.	Road and bridge tax.	Town. B. tax.	Co. B. tax.	Tax.	Dist. school tax.	Dist. road tax.	Back tax, int., & costs forfeited subsequent to July 1, 1879.	Tax.	Dog tax.	Total.
Personal property,—.				*Acres.* 100*ths*	*Dolls.*	$ *Cts.*	$ *Cts.*	$ *Cts.*	$ *Cts.*	$ *Cts*	$ *Cts.*	$ *Cts.*	$ *Cts.*	$ *Cts.*		$ *Cts.*	$ *Cts.*	$ *Cts.*
N. E.	36	1 S.	7 E.	160	734	2 35	4 84	... 81	1 61	2 28	3 77	.....	2 79	1 92	....	.....	... .	20 34
N. ½ S. E.	"	"	"	80	367	1 17	2 42	... 40	 81	1 14	1 87	.....	1 39	1 08	....	.....	... .	10 28
S. E. S. E.	"	"	"	40	184	... 59	1 21	... 20	 40	... 57	... 94	.....	... 70	... 70	....	.....	... .	5 43
Total tax																		$36 05

J. M. SCOTT,
Collector for the Town. of Lamard.

352 And afterwards, to wit, on the 18th day of May, in the year of our Lord one thousand eight hundred and eighty-five, came Bluford Wilson, the master in said cause, and filed in said clerk's office his report in said cause; which report of said master is in the words and figures following, to wit:

353 *Report Bluford Wilson, Master in Chancery.*

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

In the Circuit Court thereof.

LEANDER J. S. TURNEY and ROBLEY D. ADAMS, Complainants, *vs.* JOHN SLEVIN and Others, Defendants. } In Equity. Original Bill.

JOHN SLEVIN and Others, Complainants, *vs.* LEANDER J. S. TURNEY and ROBLEY D. ADAMS, Defendants. } Cross-Bill.

To the honorable the judges of said court:

By an interlocutory order made and entered on the 27th day of December, 1884, these causes were referred to the undersigned, master in chancery, to inquire, ascertain, and report as to certain questions therein stated. In making these inquiries the master was authorized to consider any evidence already taken in the
354 causes and such further evidence as might be offered by either of the parties on reasonable notice.

Prior to the above date this court, by its decree entered the 31st day of December, 1879, settled the title of the lands in controversy and prescribed the basis of accounting and settlement between the parties.

The only question left to be determined was the amount, if any, due the defendants in the original bill on the three mortgages made by Leander J. S. Turney, apparently a matter of no great difficulty as presented in said decree and order of reference. In point of fact, however, under the proof I have found an exact determination of the question exceedingly difficult, if not impossible, and have been obliged to be content with such approximate conclusions as to some of the items in controversy as I have been enabled to draw after a most attentive consideration of the testimony and the law cited by counsel as applicable thereto. It is believed these conclusions will be found in accord with the fair preponderance of the evidence and with equity, and that they will be sufficient under the pleadings for a final decree between the parties.

355 I respectfully report that prior to this reference the following depositions had been taken and filed in the causes:

Archibald Merrilees, by defendants in original bill, May 18th, 1880.

There was no cross-examination, although the complainant Adams was present and objected to the testimony.

Richard L. Bogg,	by complain-ts	in original bill,	June 15, 1880.
William W. George,	"	"	June 15, 1880.
Adam Rinard,	"	"	June 15, 1880.
Oliver Holmes,	"	"	June 15, 1880.
Ezra T. Hall,	"	"	June 15, 1880.
Gilbert J. George,	"	"	June 15, 1880.

Taken before John L. Handley, a notary public of Wayne county, Illinois, at Fairfield, after due notice to W. J. Conkling, one of the solicitors for the defendants. No appearance for the defendants, and no cross-examination.

Charles A. Beecher, by defendants in original bill, August 9, 1881.
Gilbert J. George, " " bill, August 9, 1881.

Taken by agreement before John A. Jones, master in chancery of this court. Witnesses cross-examined by Hanna, for complainants.

356 The following depositions were taken after the reference to me:

Albert Sloan, Amanda Gaston, Malinda Knight, John Fitzgerald, Samuel Linder, Harvey Stewart, Joseph Williams, and John Gaddis, by the complainants in the original bill, before John L. Handley, master in chancery of Wayne county, at Fairfield, March 3d, 1885.

The depositions were taken on written interrogatories, copy — which and due notice were served on John Mayo Palmer, Esq., one of the solicitors for defendants, who waived time and did not file cross-interrogatories.

After the coming in of these depositions I appointed the 12th day of March, 1885, for argument of counsel, but upon that day, upon the representations of W. J. Conkling, Esq., that he was leading counsel for defendants; that he had no notice of the taking of the depositions last above mentioned; that he was surprised by the same, and that he desired opportunity to take rebutting evidence, and upon consent thereto of R. P. Hanna, solicitor for the complainant, I extended the time thirty days.

On the 9th day of April last I proceeded to Fairfield, and,
357 being attended by the solicitors of the respective parties, I proceeded to take and on the 10th and 11th days of April, 1885, did take the depositions of the following-named parties on behalf of the defendants in the original bill: Thomas L. Cooper, Gilbert J. George, John H. Nichols, Alexander Richardson, William Whitaker, L. J. Rider, E. S. Black, John Rankin, James H. Nichols, Samuel Linder, John Fitzgerald, Harvey Stewart, and Oliver Holmes.

On behalf of the complainants, Adam Johnson.

At the close of these depositions I announced that the case must be argued at Springfield on the 22d day of April, and that I would receive any additional testimony offered by either side up to the 18th day of April, and none thereafter.

On the latter day the defendants in the original bill recalled the witnesses Holmes and Merrilees.

As the litigation has been long pending, as the lands in controversy have, by reason of the construction of railroads and from their proximity to Fairfield, the county seat of Wayne county, Illinois, become quite valuable, and as imputations were freely made
358 upon the good faith of counsel for complainants in the matter of the depositions of March 3d and the regularity of the same, I felt justified in affording the parties every opportunity to establish the truth as to the matters in controversy, both in calling new witnesses and in the recalling of certain witnesses already examined, as well as in the examination and cross-examination of the same. In company with the parties I also visited the premises and thereby obtained a much more definite idea of the situation and condition of the property than would otherwise have been possible.

In the further progress of this report I shall call the complainants in the original bill and defendants in the cross-bill the complainants and the other parties the defendants.

On the 22d day of April the issues were fully argued before me by W. J. Conkling, for the defendants, and R. P. Hanna, for the complainants. Briefs were also filed by the parties.

Upon due consideration of the orders and decrees hereinbefore mentioned, together with the pleadings, exhibits, and proofs,
359 and of the arguments of counsel for the respective parties, I respectfully report as follows:

As to the mortgages.

That there is due the defendants in the original bill and the complainants in the cross-bill—

1. On the mortgage from Turney to Eldridge upon the E. ½ S. 36, T. 1 S., R. 7 E., nine hundred ($900) dollars principal, with interest at 6 per cent. from *from* September 6, 1851.

2. On the mortgage from Turney to Beecher upon the same half section and out-lot No. 7, three hundred and thirty-seven ($337) dollars principal, with interest at 10 per cent. from July 30th, 1853.

3. On the mortgage from Turney to the Slevins upon the same half section and the N. W. ¼ N. W. ¼ S. 6, T. 2 S., R. 8 E., two thousand ($2,000) dollars principal, with interest at six per cent. from November 21, 1855, that being the date of maturity.

As to taxes.

That the defendants have paid taxes on the mortgaged premises as follows:

For the taxes of 1858 to 1861 & 1863, paid December 31, 1864	$190 68
For the taxes of 1862, paid December 24, 1862	14 20
For the taxes of 1864, paid February 6, 1865	40 04
360 For the taxes of 1865, paid May 1, 1866	29 80
For the taxes of 1866, paid May 1, 1867	30 35
For the taxes of 1867, paid May 12, 1868	17 12
For the taxes of 1868, paid April 13, 1869	34 86
For the taxes of 1869, paid April 20, 1870	101 70
For the taxes of 1870, paid May 1, 1871	136 95
For the taxes of 1871, paid May 1, 1872	132 40
For the taxes of 1872, paid May 1, 1873	116 87
For the taxes of 1873, paid May 4, 1874	92 41
For the taxes of 1874, paid May 22, 1875	110 76
For the taxes of 1875, paid June 29, 1876	94 07
For the taxes of 1875, paid December 12, 1876	22 91
For the taxes of 1876, paid April 18, 1877	86 66
For the taxes of 1877, paid April 9, 1878	83 85
For the taxes of 1878, paid March 14, 1879	67 23
For the taxes of 1878, paid April 9, 1879	17 10
For the taxes of 1880, paid April 18, 1881	31 76
For the taxes of 1881, paid April 18, 1883	68 84
For the taxes of 1882, paid April —, 1883	60 32
For the taxes of 1883, paid January 14, 1884	36 05
For the taxes of 1884, paid January —, 1885	32 68
In all	$1,649 61

By the terms of the decree of December 31, 1879, interest was to be allowed on taxes paid from the date of payment; such al-
361 lowance is also in accord with the judgment of the supreme court of the State of Illinois in the case of Blair *vs.* Chamberlin, 39 Ills., 521.

As to cost.

Said decree also provides that the defendants shall be allowed, in addition to taxes and interest thereon, all costs, with interest, incurred by them in the State and Federal courts, and, although the order of reference is silent on the question, I find and state said costs, excluding attorneys' fees, to be—

In the State's courts, as shown in Exhibit "I" Merrilees:

December 31, 1861	$89 61
May 25, 1864	251 40
December 31, 1864	63 05
In all	$404 06

With interest on the respective amounts from dates thereof.

As to the sales of land.

I find that defendants have received the following amounts from the sale of the mortgaged premises:

1. For S. W. ¼ S. E. ¼ S. 36, T. 1 S., R. 7 E., covered by Eldridge and Beecher mortgages, sold to Holmes April 23, 1872	$1,600 00
2. For out-lot No. 7, covered by Beecher mortgage, sold to Barkley November 11, 1873	400 00
3. For N. W. ¼ N. W. ¼ S. 6, T. 2 S., R. 8 E., covered by Slevin mortgage, sold to Rider August 13, 1877	800 00
In all	$2,800 00

As to possession.

Both parties in their pleadings claim to have been in possession of the mortgaged premises pending and prior to this litigation.

In the original bill filed by Smith in behalf of Turney in the Wayne circuit court October 14, 1874, to remove cloud it was alledged that Turney was then in possession of said lands.

In the amended bill filed by Hanna in behalf of Turney and Adams in the same court August 14, 1876, to remove cloud it was alledged that Adams was then owner of said lands in fee simple and was in the custody and possession of the same.

Neither of the said bills are sworn to.

In answer to the above bill filed by G. J. George and Conk-
363 ling in behalf of the Slevins and their assignees in the same court October 12, 1876, they claimed title to the lands by virtue of a certain certificate of purchase, and thereupon alleged that they had been in continuous possession of said lands and had paid taxes under said deed for more than seven years since July 21, 1863.

Again in the same answer it was alleged that they had been and were then in the constructive possession of the same and had paid all taxes on the same since the year 1859.

Again in the same answer they denied that Adams had the custody of or was in possession of said lands, and they aver that in truth and fact the said Adams took a deed to said lands with the full knowledge of their right and in the face of their undisputed and open possession.

This answer is not sworn to.

In the cross-bill filed by George and Conkling in behalf of Slevins and others in this court March 2nd, 1877, they allege that they have had possession of the mortgaged premises ever since the 21st
364 day of July, 1863, under a deed from Barkley, master in chancery of Wayne county.

This bill is signed by Conkling and George, solicitors for the complainants in the cross-bill, and John Slevin, one of the complainants therein, swears that all the facts enumerated in said cross-bill are true as he verily believes.

and 1865 from the Slevins and paid them the rent for the same. The witness Sloan, with Henry Baker and Jerry Windle, worked for Gash. Sloan confirms her statement. Baker and Windle are dead,
but Amanda Gaston, at the time wife of Baker and aunt to
371 Sloan, corroberates the witnesses, Knight and Sloan. The amount of rent paid does not appear. There is some evidence (that of the witness Fitzgerald) tending to show that a Mr. Wooton, brother-in-law of Mr. C. A. Beecher, had a portion of the land in corn in 1865-'6, and that it was all under fence and all in cultivation except the timber land.

Samuel Linder swears that the land was all under fence and in cultivation in the summer of 1863, when the Slevins took possession of it, and that they kept continuous possession of it until 1872, except the Holmes forty.

This witness also mentioned the Rider occupation of the forty acres, in section 6, for several years under his lease and the subsequent purchase.

Joseph Williams, in his deposition filed March 6th last, swears to the possession by the Slevins.

But I attach little weight to the evidence of Fitzgerald and Linder on the question of possession. The positive statements made
372 by them in their depositions of March 6th were either contradicted or greatly impaired in their oral examination before me at Fairfield, April 10th.

So much appears in the evidence as to the possession of the Slevins and its character.

To the contrary is the testimony of the witness Williams and others to the effect that Turney, in the spring of 1874, some time after his return from Washington Territory and about the time of filing the original bill in the Wayne circuit court to remove cloud, undertook to secure actual possession of the land by the erection of a cheap house on the dividing line between the tracts in section 36 and in section 6 and within a few rods of the northern limits of Fairfield. In this building he placed a widow woman and her family as his tenants. George, as the agent and attorney for the Slevins, at once brought an action of forcibly entry and detainer before a Fairfield justice, which resulted in the speedy surrender of the premises by the woman. The witness, Harvey Stewart, thereupon at once occupied the house under written lease of the whole premises from the Slevins. The house was afterwards occupied by
Sloan; afterwards by Nalley, and was by the latter bargained
373 in some way to Sloan, who moved it across the line into Fairfield.

This episode, lasting at best but a few weeks, appears to be the only effort made by Turney outside of filing his bill and making the deed to Adams to get possession of or exercise actual ownership over the lands from the time of his departure to Washington Territory, in 1861. He made no leases and paid no taxes. The transaction appears to be consistent with the drift of all the evidence and to be corroborative of the fact of the continuous possession of the

lands by the Slevins, as stated in their cross-bill, from July, 1863, to the date of the decree of December 31, 1879.

Against their cross-bill and these circumstances and witnesses counsel for the Slevins in argument rely chiefly upon the testimony of Charles A. Beecher, Esq., filed August 9th, 1881.

It appears from his testimony that he obtained deeds for the lands in behalf of the Slevins from J. G. Barkley, special master, in July, 1863. At that time he did not think the fences were in condition to protect crops, and shortly after that the fences were all
374 hauled away by parties other than Mr. Slevin. From 1863 to 1872, when Beecher left Fairfield, he says no attempt was made to rent the property, and from his knowledge of its situation he was satisfied it could not have been rented for anything. No application was ever made to him for it. From 1863 to 1872 there was no actual occupancy beyond paper title, that he was aware of. The only possession he ever had was in receiving and recording deeds. He did not believe the lands had any rental value in the condition they were in from 1863 to 1872, and thought he had exclusive charge of Mr. Slevins' business in relation to the property during that time. He says there was no physical possession. Taxes were paid, but all the lands, except perhaps a few acres in section 6, lay out in commons.

And that is all the evidence on the question of possession cited and relied upon in argument by the solicitors for the defendants in the original bill; and, if we except the conflicting statements of G. J. George and the general concurrence of the witnesses that the lands, except the Holmes and Rider tracts, were for the most part uninclosed after 1865; that is all the evidence adduced on
375 their side of the case. As much as we may respect Mr. Beecher, his testimony, whether taken alone or in connection with the other statements referred to above, is not, in my judgment, sufficient to negative the positive averments of his clients in their answer to the original bill and in their cross-bill and their letter of February 19th, 1877, to say nothing of their various acts of dominion over the land, which were sufficient to indicate to everybody residing in the town and neighborhood that they had, through their agents, Beecher, George and Saylor, exclusive control and management of the lands.

Mr. Beecher, as to rental, is in direct conflict with his partner George and the witness Rider, both of whom swear to the lease of the tract in section 6, made to the latter about 1869, three years before Beecher left Fairfield. He also — in conflict with the witnesses Malinda Knight, Amanda Gaston, Albert Sloan, Williams, and Fitzgerald as to the Gash and Wooten crops about '64, '5, and '6.

And what is to me of much greater importance than these conflicts is the antagonism between Mr. Beecher's statement as
376 to the physical possession of the land, its condition as to fences, and its rental value when he acquired title and possession for his clients in 1863, and the statements on the same points by the witnesses Boggs and W. W. George, both of whom declare

that the lands were then under fence, in cultivation, and in good condition for farming.

These gentlemen are among the oldest, most intel-igent, and most respectable citizens in the county, as are also Adam Rinard and Ezra T. Hall, who concur with them and G. J. George in fixing the fair rental value of the property.

What occurred after 1872 Mr. Beecher does not pretend to say, and the evidence is [as] to the Rider lease prior thereto, as to the Stewart lease in 1874, as to the Slevins letter of February 19, 1877, and as to the sales to Holmes, Barkley, and Rider is wholly uncontradicted.

Finally, the decree of December 31st, 1879, which is claimed by council for defendants to have been made upon consent and agreement of the respective parties, but which is upon its face the
377 independent judgment and decree of the court, is made upon the theory that John and James Slevin had possession of the entire mortgaged premises, and by reason of such possession had become liable for rents and profits and waste, and thus they were required to account for the same precis-ly as they were required to account for the proceeds of the sales undoubtedly made by them of certain portions of the mortgaged property.

If the decree was by the consent of parties it seems to be a clear concession by counsel for the Slevins of the question of possession.

If it was the decree of the court it was equally significant and conclusive; but in any contingency and in any view the decree is now seen to have been consistant with the evidence, and in its requirements as to an accounting between the parties and as to the items thereof it is in accordance not only with the facts, but also with the principles of equity and precedent.

Even if the land had been wholly uninclosed from the
378 first the taking therefrom of wood for fuel, fences, and other purposes, which there is abundance of evidence *of* to show was done with the knowledge or within the easy means of knowledge of the Slevins or their agents, would have been sufficient to establish in law actual possession. Austin *vs.* Bush, 73 Ill., 491.

I find, therefore, as to possession, that the defendants in the original bill and complainants in the cross-bill had actual possession of the mortgaged premises from July 21st, 1863, to the 31st day of December, 1879, with the exception of two or three month- in the year 1874, during w-ich Turney had forcible possession of the same.

This dominant fact substantially disposes of the very clear and forcible brief filed in the cause by John Mayo Palmer and W. J. Conkling, in behalf of their clients, and of the points made in oral argument by Mr. Conkling. They have proceeded throughout upon the theory that there was no actual possession of the premises
379 by their clients, and that, therefore, there was no liability to account for rents and profits. In this conclusion they are at variance, in my opinion, with the clear and decided preponderance and weight of the evidence.

They advance one other view. They claim that the order of December 31, 1879, was in fact, though not in form, a consent decree, and, being such, is conclusive as to the manner in which the account between the parties should be stated, and as to rents they claim that they are limited in express terms to the rents and profits derived from the land during the time the defendants were in possession. They thereupon claim that they are liable only for rents actually received and that there is no liability for rents and profits that might have been received from the mortgaged premises by reasonable care and prudence. In support of this proposition Mr. Conkling produced the original decree and pointed out that the words "or that might have been received," in the
380 rental clause, had been twice inserted in the handwriting of Mr. Hanna, counsel for Adams, and was as often, through his, Conkling's, strenuous opposition, erased and finally omitted. The point is not without force. I suppose the parties had a right, if the decree was a matter of agreement, to undertake to protect themselves against the contingent liability involved. Whether they have, in fact, done so, however, or what effect, if any, is to be given to the circumstances mentioned, is not for me to say. The court, as I did not fail to point out, has already interpreted the decree, and I am directed in express terms by the order of reference to inquire and as-certain not only the rents and profits received, but also how much might have been received by reasonable care and prudence.

And such, as against a mortgage- in possession, seems to be the law as laid down in the authorities cited by the respective parties. In Mosier *vs.* Norton, 83 Ill., 534, the court says: "He will be
381 chargeable with what he receives, and if by reasonable diligence more could have been received he must account for it."

In Clark *vs.* Felton, 90 Ill., 247, it is said: "He is only bound to account for actual receipts, unless it is shown more could have been received."

And to the same effect see—

McConnell *vs.* Hollenbush, 11 Ill., 70; Robert *vs.* Fleming, 53 Ill., 204; Harper *vs.* Ely, 70 Ill., 584.

In I. T. Jones on mortgages, sec. 1123, the rule is stated to be—

"He will be held to account for reasonable rents and profits or what the property would produce if managed with prudence. He must account for wast [waste] committed by him while in actual possession. If he kept no accounts he will be chargeable with what he might have received."

The rule is not different as interpreted by the Supreme Court of the United States. Bigger *vs.* Waller, 14 Wallace, 893.

And it is conceded to be the law that where the mortgagee
382 takes possession under a void sale he will be treated as a mortgagee in possession rather than as a trespasser.

Except the item $17.10, acknowledged by Merrilees to have been received April 9th, 1879, on account of the Rider lease, the actual receipts are not shown in the evidence. It seems reasonably certain, however, that from 1869 to the 13th day of August, 1879, the date

of the purchase by Rider, he paid rental at least to the amount of the annual taxes on the tract in question.

See George's deposition of June 15th, 1880.

There is also on the back of tax receipts in the year 1878 for the 1877 taxes, produced by Merrilees, a memorandum in pencil acknowledging a check from Beecher, George and Sailor for $16.00 and crediting the same to tax account. The tax on the Rider track that year was $16.27. Whether Rider's rental exceeded the taxes does not clearly appear. The amount of taxes during the period from 1869 to December 31, 1879, on the Rider land, as shown by the tax receipts, was, 1869, $21.80; 1870, $20.98; 1871, $19.87;
383 1872, $24.95; 1873, $14.70; 1874, $16.80; 1875, $22.91; 1876, $13.86, 1877, $16.27; 1878, $17.10—in all $188.62

The amount of rental, if any, paid by Gash and Wooton does not appear, nor does it in the case of the Steward lease of the land in 1874, although it was evidenced by duplicate writings, and was doubtless an entirely authentic transaction as an assertion of actual visible possession.

Nor does the witness Sloan state the amount of rental, if any, paid George for the house on the premises.

Nor or [are] the receipts, if any, shown from Nally for the use of the same house. George denies that there were any.

Notwithstanding Wooton and Gash seeme to have occupied a portion of the premises from '64 to '66, and Rider continuously from '69 to '79, and Stewart, Nally, and Sloan from 1874 to 1876, and so covered pretty much the whole period from 1863 to 1879, the fact, doubtless, is that the rents actually received by the defendants
384 during that period were insignificant. No well-directed effort seems ever to have been made by them to keep the lands under fence and in rentable condition. Beecher, George and Sailor, local agents for the Slevins, deny that they had any authority to do so, and the Slevins themselves seem to have paid no attention whatever to render the lands productive or to keeping them in rentable condition by maintaining and repairing the fences. They appear to have relied entirely upon the sales of the land for the cancellation of their debt, and after the fences had entirely disappeared from all the lands except the Rider tract they rejected an offer, in writing, from a responsible party (Holmes, 1877) to rent for three years the entire premises, and to place a good plank fence around the same in lieu of rental for the three years.

This would have cost for a rail fence about $1,050 (Hall's deposition), and was equivalent to an offer of at least $350.00 a year in cash. This seems to me to have been a fatal error and a gross failure in the exercise of that reasonable care and prudence
385 w-ich the law demanded at their hands.

"A mortgagee in possession is authorized and even bound to lay out money to keep the estate in necessary repair and to preserve it." McConnell *vs.* Hollenbush, 11 Ill., 70.

In addition to this it clearly appears, as we have seen from the evidence of Boggs, who knew the land well, and of W. W. George, who fenced it and farmed it originally, that it was under fence and

in cultivation; that it was good land and in good condition for farming when the Slevins took possession in 1863. They place its rental value at $2.00 per acre, and more, if well managed and rented on "thirds." Adam Rinard and Ezra T. Hall confirm this. It is worthy of note, in this connection, that G. J. George, solicitor and agent for the Slevins, states his recollection, in his deposition taken at the same time with the foregoing, that the lands in section 36 were under fence and in cultivation in May, 1863, and that $1.50 per acre per annum, in addition to paying taxes and keeping
386 the fence in repair, was a fair rental for the lands. Rider and others testified before me to the same general effect, and concurred in the statement that the lands were reasonably worth, in rental value, $2.00 per acre annually, and if under fence that they could have been rented at that figure. If the lands were under fence when the Slevins took possession in 1863, it was their duty to have maintained them. If they were not under fence, or only partially so, it was their duty to have repaired the fences or to have accepted some such offer as that of Holmes. Not to have done so was to render themselves liable not only for waste, but also for the consequent loss of rentals which might otherwise have been reasonably secured.

Considering, however, that the Slevins had some reason to suppose, when they entered upon possession of the lands under the Barkley deed in 1863, that they entered as owners and not as mortgagees, and were thereby thrown off their guard; and considering further that they were non-residents and remote from the lands, it
387 would only be equitable to abate somewhat from the extreme figures of their legal liability.

The house placed upon the premises by Turney in 1874 was practically in the town of Fairfield and might have been rented continuously at from $5.00 to $8.00 per month from 1874 to 1879, five years, at the lowest figure, equal to $60.00 per annum or $300.00.

As this was part of the general rental value of the lands, I do not include it in my finding under the head of rent. For the same reason I exclude the Rider item of tax.

As the evidence shows that from sixty to eighty acres of the mortgaged premises was in timber and brush and therefore not in condition for cultivation, and as the evidence fails to show definately its actual rental value as pasture land, and as it is not certain that the witnesses meant to include it in their valuations of the land for rental purposes, I exclude it also from my computations.

Estimating the timber land at seventy acres, there would be left 270 acres subject to rent.

388 George, the agent of the parties, fixed the rental value at $1.50 per acre in addition to taxes and repairs. This would amount to an annual rental of $405.00, over and above taxes and repairs. As these figures are on the whole consistant with those of the other witnesses and yield substantially the same results, they might well be accepted as the measure of the defendant's annual liability; especially as even the Holmes proposal, owing to the lack of data as to the cost of "a good plank fence" as against a rail

fence estimated for by Dr. Hall, is uncertain and indefinite. On Hall's figures the rent would have amounted to more than $300.00 per annum.

After making all due allowances it does not seem to be reasonably certain from the evidence that the lands might have been rented with very little effort for at least $350.00 per annum in addition to taxes and repairs, and that without reference to the precise number of acres cultivable; I find therefore—

389 As to rents.

That the defendants in the original bill and complainants in the cross-bill, by the exercise of reasonable care and prudence, might have received as rents and profits from the mortgaged premises, in addition to taxes and repairs, the sum of three hundred and fifty dollars ($350.00) per annum from July 21st, 1863, to the 23 day of April, 1873, the date of the sale to Holmes, and after that at the same rate per acre on the lands held by them down to December 31st, 1879, and that they should be charged in the account between the parties at that rate annually, with interest.

As to waste.

It appears from the evidence of C. A. Beecher, Boggs, W. W. George, and G. J. George that the premises were under fence when the Slevins took possession in 1863, though the parties differ as to the condition of the fences. Mr. Beecher states that they were originally very poor and were all hauled away by parties other than the Slevins soon after the above date.

390 This should not have been permitted, and, as we have seen, it was the duty of the Slevins or of Beecher, their agent, to have protected the property, to have repaired the fences if poor, and to have replaced them at the cost of the estate when worn out. Their neglect to do so was clearly waste.

It also appears that there were at different periods in the history of the property three buildings thereon capable of being used and in use by tenants. The fact- as to the last building, the one erected by Turney in 1874, are undisputed, except as to its value and the circumstance of its removal.

Its value is stated in the evidence all the way from fifty to seven or eight hundred dollars. It was a cheap house, and probably did not cost originally over two hundred and fifty dollars, and was subsequently improved, but whether while on the Slevins land or after its removal does not appear. It does, however, fully appear

391 that it had in its original location an actual rental value of from sixty to eighty dollars per annum, and permitting its removal was an act of waste on the part of the Slevins or their agents. It is immaterial for the purpose of this inquiry whether George sold the house to Nally or not.

The evidence as to the two other buildings "stolen by time," as one of the witnesses states, is too indefinite to enable me to draw any

conclusion as to their value or to fix the responsibility for their disappearance.

There is great controversy and conflict in the testimony over the timber. About seventy acres of the land was in white oak, post oak, and scrub. There was some fair timber on the northeast tract and along and near the deviding line between G. J. George's land and the land in controversy. There was also originally about five acres near the line of the railroad, which seems to have been stripped about the time of the construc-
392 tion of the railroad — 1871 and 1872. The evidence is conclusive that from these dates to 1876 a number of saw logs were cut and hauled off the premises, and also a quantity of cord wood, rails, and stakes. The witnesses Linder, Williams, Sloan, Johnson, and John Gaddis all swear that the cutting was done under George's direction and authority. Linder, an intel-i-gent witness and, I think, reliable, on this point says that as many as two hundred logs and five thousand rails were taken from the land under George's direction from 1874 to 1876; that the logs were sold to the millers, Sailor and Gaddis, and that the rails went into the division fence between George's land and those in controversary. Gaddis, the miller, testifies to forty or fifty logs bought by him off the Slevins land, for which he paid George fifty cents each. Mr. George himself states that Gaddis is a "straight" man.

The count of the stumps made by Merrilees and Holmes is substantial confirmation of the above evidence, and as they did
393 not include the stumps outside the present Adams fence, on the roadway that now separates George's from the Slevin land, I am inclined to accept the Linder evidence and that of others as conclusive of the quantity taken, especially as, upon cross-examination, they showed a knowledge of the lands and the location as distinguished from the George land, from which it was sought to be shown the timber was taken. It further appears that the George lands were not cleared until some time after, along in 1879 or 1880. It is not important to pass upon the question as to Mr. George's precise responsibility in the premises. He denies that he ever authorized anybody to cut logs or rails off the Slevin land, or that he ever paid anybody for so doing, or that he ever received anything for the sale of the same; but the weight of the testimony is against him, besides the taking was either with his knowledge or within the easy means of knowledge, and might have been readily prevented. It is also obvious that the loss of the timber was largely a
394 consequence of the neglect to fence or to maintain fences. The responsibility for the loss of the timber rests, therefore, fairly upon the defendants in the original bill; and although it was never of great value, yet from its proximity to Fairfield it would have had an annually increasing value.

The buildings, fences, and timber comprise all the items of alleged waste, and from the evidence I find—

That the defendants in the original bill and complainants in the cross-bill have committed waste on the lands in question in respect

of the buildings, fences, and timber, and should be charged for the same in the account as follows:

For the buildings removed	$250 00
For the fences permitted to be hauled away, one-third of the value of a new one	350 00
For the timber cut and removed, 50 logs, sold to Gaddis by George, @ 50c. each, $25; 5,000 rails @ $35 per thousand, $175; cord wood and stakes, $10	210 00
In all, the sum of	$810 00

Conclusion.

In the light of the foregoing findings I conclude that the
395 account between the parties should be thus stated:

The taxes and repairs to be treated as cancelled annually by the annual rent charge allowed in addition to the $350.00.

The principal of the three mortgages is $3,237, of which $337 bears interest at ten per cent. and the balance, $2,900, at 6 per cent. per annum. Interest should be computed to the 21st day of July, 1864. Costs and interest thereon should be added to the interest account, and from the sum of interest should then be deducted one year's rent, or $350.00.

The annual interest account, from July, 1864, to April 23, 1872, would be $207.70, and the yearly difference between that sum and the annual rent would be $142.30.

The rent per acre would be 350, 360, or 97 $\frac{2}{3}$ cents. I have deducted at this rate from the amount of the annual rental after the sale to Holmes and Rider, respectively.

On the above basis I present the following summary:

Due defendants July 21, 1864, the end of the first year of their possession—

396	On account of the Eldredge mortgage, principal	$900 00
	On account of the Beecher mortgage, principal	337 00
	On account of the Turney mortgage, principal	2,000 00
	Principal	$3,237 00
	On account of the Eldridge mortgage, interest @ 6 per cent., 12 years 10 months and 15 days	$695 50
	On account of the Beecher mortgage, interest @ 10 per cent., 10 years 11 months and 21 days	369 85
	On account of the Turney mortgage, interest @ 6 per cent., 8 years and 8 months	1,040 00
	Interest due July 21, 1864	$2,105 35
	Add costs paid December 31, 1862, $89.61, and $8.79, interest @ 6 per ct. to July 21, 1863	98 40
	Add costs paid May 25, 1864, $251.40, and $2.33, interest @ 6 per cent. to July 21, 1863	253 73

Total due defendants July 21, 1864, principal, $3,237, interest and costs		$2,457 48
Deduct one year's rent		350 00
Balance, principal, $3,237, and interest		$2,107 48
Add one year's interest to July 21, 1865, $33.70, and $173.00		207 70
Add costs paid December 31, 1864, $63.05, and $2.41, interest to July 21, 1863		65 46
Total due defendants July 21, 1865, principal, $3,237; interest and costs, $2,380.64		$5,617 64
397 April 23, 1872, deduct Holmes' payment for 40 acres	$1,600 00	
Also amount of annual difference between rent, $350.00, and $207.30, interest, $142.30 for 6 years 9 months and 2 days	961 30	
		$2,561 30
Balance due defendants April 23, 1872		$3,056 34
November 11, 1873, add interest, 1 year 6 months and 18 days, @ 10 per cent. on $337		52 23
Add int., 1 year 6 months and 18 days, @ 6 per cent. on $2,719.34		251 89
		$3,360 46
November 11, 1873, deduct Barkley payment	$400 00	
Also rent charged at $311.12 per annum for one year 6 months and 18 days	481 48	
		881 48
Balance due defendants November 11, 1873		$2,478 98
August 13, 1879, add int. for 5 years 9 months and 12 days @ 10 per cent. on $337.00 (add int. for 5 years 9 months and 12 days @ 6 per cent. on $2,141.98)		925 56
		$3,404 54
August 13, 1879, deduct Rider payment for 40 acres	$800 00	
Also rent, charched [charged] at $311.12 per annum, for 5 years 9 months and 2 days	1,790 65	
		2,590 65
398 Balance due defendants August 13, 1879		$813 89
December 31, 1879, add interest for four months and 18 days @ 10 per cent. on $337.80		12 91
Add interest for four months and 18 days @ 6 per cent. on $476.89		10 97
Balance due defendants December 31, 1879		$837 77

December 31, 1879, deduct amount rent charged at $272.24 per annum for 4 months and 18 days	$105 35
Also waste account	810 00
	915 35
Balance due complainants in the original bill December 31, 1879	$77 58

But by the terms of the decree of December 31, 1879, the complainants were to pay all costs in the United States courts; and they do not seek in their bill to recover any balance found due on account stated.

I therefore respectfully report that it should be decreed that the debt due the defendants in the original bill and complainants in the cross-bill under the several mortgages herein mentioned has been fully paid, including interest, taxes, and costs; that the title to the lands in controversy, except sales confirmed by the de-
399 cree of December 31, 1879, be declared to be in said complainant in the original bill, Robley D. Adams, and that he pay the costs and fees under this reference and in this court.

BLUFORD WILSON,
Master in Chancery.

(Endorsed:) Filed May 18, 1885. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 16th day of June, at the June term of court, in the year last aforesaid (1885), the following further proceedings were had in said court and entered of record, to wit:

Order Extending Time to File Exceptions to Master's Report.

LEANDER J. S. TURNEY *et al.* *vs.* JAMES SLEVIN *et al.* } In Chancery. 4933.

On motion of defendants, by William J. Conkling, Esq., their solicitor, the time for filing exceptions to master's report is extended twenty days from the 17th inst.

400 And afterwards, to wit, on the 26th day of June, in the year last aforesaid (1885), came the defendants in the original bill, by their solicitors, and filed in said clerk's office their exceptions to the master's report in said cause; which said exceptions are in the words and figures following, to wit:

Exceptions to Master's Report.

In the United States Circuit Court, Southern District of Illinois.

LEANDER J. S. TURNEY and ROBLEY D. ADAMS, Complainants, *vs.* JOHN SLEVIN and Others, Defendants. } Original Bill.

JOHN SLEVIN and Others, Complainants, *vs.* LEANDER J. S. TURNEY and ROBLEY D. ADAMS, Defendants. } Cross-Bill.

Exceptions taken by John Slevin and others, defendants in the original bill herein, and who are complainants in the cross-bill herein filed, to the report of Bluford Wilson, Esq., the master
401 in chancery, to which [whom] this cause stands referred, by the interlocutory order made herein on the 27th day of December, 1884, and which report bears date May 18th, 1885.

First exception. For that the said master, in and by said report, found and reported to the court that these exceptants were in the actual possession of the lands in the pleadings in this cause described at some time or times, when it appears from the evidence that these exceptants were never at any time in the actual occupancy or possession of said lands.

Second exception. For that the said master, in and by said report, finds and reports to the court that these exceptants are liable for and chargeable with large sums of money for the rents and profits of the lands in the pleadings described which they might have received by the exercise of reasonable care and prudence.

Third exception. For that the said master, in and by the said report, has found and reported to the court that these exceptants
402 are liable for and chargeable with the natural decay of the improvements on said lands and the cutting and removal of timber upon and from the lands aforesaid as waste committed by these exceptants.

Fourth exception. For that the said master has found and reported to the court in and by his said report that there is a balance due to the complainants in the original bill, the sum of seventy-seven dollars and fifty-eight cents.

Fifth exception. For that the said master, in and by his said report, has erroneously computed interest upon sums of money reported by him to have been received by these exceptants on account of rents of the lands in the pleadings described.

Sixth exception. For that the finding and conclusions of the said master in the said report contained are unwarranted by the evidence in the cause.

Seventh exception. For that the conclusions and findings of the said master in the said report contained are unwarranted and
403 are beyond the scope of the interlocutory order herein referring the said cause to him.

Wherefore the said defendants in the original bill herein and complainants in the said cross-bill do except to the said report of the said master in chancery and appeal therefrom to the judgment of this honorable court.

WILLIAM J. CONKLING AND
PALMERS, ROBINSON & SHUTT,
For the Exceptants Aforesaid.

(Endorsed :) Filed June 26, 1885. J. H. Jones, clerk.

And afterwards, to wit, on the 12th day of March, being Friday, at the January term of court, in the year of our Lord one thousand eight hundred and eighty-six, the following further proceedings were had in said court in said cause and entered of record, to wit:

404 *Final Decree.*

LEANDER J. S. TURNEY and ROBLEY D. ADAMS
vs.
JAMES SLEVIN and THOMAS SLEVIN. } In Chancery. Original Bill.

JOHN SLEVIN, THOMAS E. SLEVIN, and JAMES L. Slevin, and John F. Slevin, August Trum, and Anthony Shouter, Trustees of J. & J. Slevin & Co.,
vs.
LEANDER J. S. TURNEY and ROBLEY D. ADAMS. } Cross-Bill.

And now, on this 12th day of March, A. D. 1886, again come said parties, by their solicitors, and Bluford Wilson, one of their masters in chancery of this court, to whom this cause was refer-ed by an order entered on the 27th day of December, 1884, having submitted his report and findings herein, and the court, being now fully advised in the premises, doth overrule the exceptions to the report of the master and find, in accordance with the finding of the said master, that the mortgage executed by Leander J. S. Turney and Elizabeth Turney, his wife, to Charles W. Eldridge on the 6th day of September, A. D. 1851, and recorded, on the same date, in
405 Deed Record "E," on page 122 of the record books of Wayne county, Illinois, to secure one promis-ory note of same date for the sum of $\$900\frac{00}{100}$, due January 1st, A. D. 1856, on the east half of section thirty-six, in town. one south, of range seven east, in Wayne county, Illinois, and that the mortgage executed by Leander J. S. Turney to Edwin Beecher on the 30th day of July, A. D. 1853, and recorded on the same date in Deed Record "F," at page 434, to secure one promis-ory note of that date for the sum of $\$337\frac{00}{100}$, due on the first day of March, A. D. 1854, with ten per cent. interest from date, on the east half of section thirty-six, town. one south, of range seven east, in Wayne county, Illinois, and on out-lot number

seven (7), in Turney's Second Addition to Fairfield, Illinois, were both sold, transfer-ed, and assigned to John and James Slevin in the year A. D. 1860, who then became the lawful and equitable owners of the same.

And the court doth further find that on the 21st day of November, A. D. 1853, said Leander J. S. Turney executed and delivered to John and James Slevin a mortgage on the east half of section thirty-six, town. one south, of range seven east, and the north-
406 west quarter of the northwest quarter of section six, town. two south, of range eight east, in Wayne county, Illinois, which mortgage was recorded on the 21st day of November, A. D. 1853, in Book A of Mortgages, page 5, of the records of said Wayne county, Illinois, to secure one promis-ory note of the sum of $2,000\frac{00}{100}$, of even date of said mortgage.

And the court doth further find that there was due to said John and James Slevin on all of said notes and mortgages and the interest thereon and costs and tax paid by them on the 21st day of July, A. D. 1864, the sum of five thousand six hundred and seventeen dollars and sixty-four cents ($5,617.64).

And the court doth further find from the evidence in this cause and from the findings and report of the master herein that on the 21st day of July, A. D. 1863, the said John Slevin and James Slevin, as mortgagees, took possession of the east half of section thirty-six, town. one south, of range seven east, and the northwest quarter of the northwest quarter of section six, town. two south, of range eight east, in Wayne county, Illinois, and remained in possession of the
407 same by themselves and their tenants and those holding under them, as mortgagees in possession, until the 31st day of December, A. D. 1879, and that the said lands were all under fence and susceptible of cultivation at the time of taking possession of the same, and that the rents and profits derived from said lands and that might have been derived from said lands by prudent management of the same amount to the sum of two dollars per acre per annum, or one dollar and fifty cents per acre per annum, over and above taxes and necessary repairs to keep and preserve the estate.

And the court doth further find, from the evidence in this cause and the report of the master filed herein, that waste was committed on said lands, while the same was in possession of said John and James Slevin and their tenants and those holding under them, by the removal and destruction of buildings standing on said lands while they had possession of the same and by the removal of the fencing from around said lands and by the sale and destruc-
408 tion of the timber on said land, to the amount, in the aggregate, of eight hundred and ten dollars ($810.00).

And the court doth further find that the said John and James Slevin have received from Oliver Holmes, on the 23rd day of April, A. D. 1872, the sum of sixteen hundred dollars ($1,600.00) for the sale of the southwest fourth of the southeast quarte- of section thirty-six, town. one south, range seven east, being a part of said lands; and on the 11 day of November, A. D. 1873, said John and James Slevin, the mortgagees, received from David W. Barkley the sum

of four hundred dollars ($400.00) for sale of said out-lot number seven, in Fairfield, being a part of said mortgaged premises; and on the 13 day of August, A. D. 1879, said Slevins and their trustees received from Lewis J. Rider the sum of eight hundred dollars ($800.00) for sale of the northwest fourth of the northwest quarter of section six, town. two south, of range eight east, being a part of said mortgaged premises; all of which said sums should also be a credits on the said notes, above described, due from Leander J. S. Turney to said John and James Slevin and the mortgage given to secure the same.

409 And the court doth further find, from the evidence in this cause and from the report of the master filed herein, that the amount received or that might have been received by prudent management of said estate while in possession of the same by said John and James Slevin, for rents derived from said lands while they and those holding under them had possession of the same, and from the wastes committed on said lands while so in possession of said John and James Slevin and those holding under them, and from amounts of money received from Oliver Holmes and from David W. Barkley and from Lewis J. Rider for sale of portions of said mortgaged premises, amount in the aggregate to seventy-seven dollars and fifty-eight cents ($77.58) more than the amount due said John and James Slevin on all of their said notes and mortgages above described, to wit: The mortgage executed by Leander J. S. Turney and Elizabeth Turney, his wife, to Charles W. Eldridge on the east half of section thirty-six, town. one south, range seven east, and recorded in Book "E" of

410 Deeds, page 122, of Wayne county, Illinois, to secure one note of $900.00, and the mortgage executed to Edwin Beecher on the east half of section thirty-six, town. one south, range seven east, and out- lot nomber 7, in Turney's Second Addition to Fairfield, Illinois, and recorded in Deed Book "F," at page 434, of Wayne county, Illinois, and the mortgage executed by Leander J. S. Turney to John and James Slevin, on the 21st day of November, A. D. 1853, on the east half of section thirty-six, town. one south, range seven east, and the northwest quarter of the northwest quarter of section six, town. two south, range eight east, and recorded in Mortgage Book A, at page 5 of the mortgage records of Wayne county, Illinois, and also all interest on said notes secured by said mortgages and all tax paid by John and James Slevin while they had possession of the same and all costs and charges paid by said John and James Slevin in and about said lands and all amounts expended in any way in preserving said estate while so in their charge and custody and possession and control.

411 And the court doth therefore finally adjudge and decree that the title to the said northeast quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter, all in section thirty-six, town. one south, range seven east, being all of the east half of section thirty-six, town. one south, range seven east, except the southwest quarter of the southeast quarter of section thirty-six, town. one south, range seven east, heretofore sold to Oliver Holmes, is in said complainant, Robley D.

Adams, free and clear of any and all liens or incumbrances of any kind or nature by virtue of any of said mortgages above described executed by said Leander J. S. Turney, which said mortgages are hereby decreed to be fully paid off, discharged, and satisfied.

And it is further decreed that said Robley D. Adams pay all costs (except solicitors' fees) occasioned by this proceeding.

And afterwards, to wit, on Wednesday, the 19th day of May, at the term of court and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

412 *Order Allowing Appeal.*

LEANDER J. S. TURNEY *et al.*
vs.
JAMES SLEVIN *et al.*
} In Chancery.

This day came again the parties and the defendants pray an appeal to the Supreme Court of United States, not to operate as a supersedeas, which is allowed on their entering into bond to the complainants in the penalty of ($500) five hundred dollars, conditioned as the law directs, within ninety days from date.

And afterwards, to wit, on the 5th day of August, in the year last aforesaid (1886), came August Trum, as trustee of J. & J. Slevin & Co., and filed in said clerk's office his appeal bond in said cause, which was approved by the court, and which said bond is in the words and figures following, to wit:

413 *Appeal Bond.*

Know all men by these presents that I, August Trum, trustee of J. and Ja. Slevin and Co., as principal, and Florence Marmet, Bernard Trum, as sureties, are held and firmly bound unto Leander J. S. Turney and Robley D. Adams in the sum of five hundred dollars, to be paid to the said Leander J. S. Turney and Robley D. Adams, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severely, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seal- and dated this thirtieth day of July, 1886.

Whereas the above-named August Trum, trustee as aforesaid, prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in a certain cause wherein Leander J. S. Turney and Robley D. Adams are complainants and James Slevin and Thomas Slevin are defendants, by the circuit court
414 of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named August Trum, as trustee as aforesaid, shall prosecute in behalf of James Slevin and Thomas Slevin said appeal to effect and answer all costs if he shall fail to make good their plea,

then their obligation shall be void; otherwise the same shall be and remain in full force and virtue.

AUGUST TRUM,
Trustees J. and J. Slevin and Co. [SEAL.]
FLORENCE MARMET. [SEAL.]
BERNARD TRUM. [SEAL.]

Sealed and delivered in the presence of—
C. SLEVIN.
ROB'T C. GEORGE.
CHAS. W. RATTERMANN.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Florence Marmet, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name situate in the
415 county of Hamilton, in said district.

FLORENCE MARMET.

Sworn to before me the 30 day of July, 1886.

ROB'T C. GEORGE,
Clerk U. S. District Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Bernard Trum, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

BERNARD TRUM.

Sworn to before me the 30 day of July, 1886.

ROB'T C. GEORGE,
Clerk U. S. District Court, S. D. O.

THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

I, Benjamin R. Cowen, clerk of the U. S. district court within and for the district aforesaid, do hereby certify that I am person-
416 ally acquainted with Florence Marmet and Bernard Trum, the sureties, and that they are good for the penalty above stipulated.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, O., this 30th day of July, A. D. 1886.

[SEAL.]

B. R. COWIN,
Clerk U. S. District Court, S. D. O.,
By R. C. GEORGE, *Deputy.*

(Endorsed:) Filed August 5, 1886. J. A. Jones, clerk.
(Also endorsed:) Approved Sept. 1st, 1886. S. H. Treat, dist. judge.

417 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the Circuit Court of said District.

I, John A. Jones, clerk of the circuit court of the United States within and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and the proceedings thereon had in a certain cause lately pending in said court, wherein Leander J. S. Turney and Robley D. Adams were complainants and James Slevin and Thomas Slevin were defendants in the original bill, and John Slevin, Thomas E. Slevin, and James L. Slevin and John F. Slevin, August Trum, and Anthony Shouter, trustees of J. &. J. Slevin & Co., were complainants and Leander J. S. Turney and Robley D. Adams were defendants in the cross-bill, as fully as the same appear from the records and files of said cause in my office.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 22d day of September, in the year of our Lord 1886, and of our Independence the 111th year.

J. A. JONES, *Clerk.*

Endorsed on cover: S. Illinois C. C. U. S. No. 243. August Trum, trustee of J. & J. Slevin & Co., appellant, *vs.* Leander J. S. Turney and Robley D. Adams. Filed October 23, 1886.

Office Supreme Court U. S.
FILED,
MAR 24 1890

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1889.

No. 243.

AUGUST TRUM, TRUSTEE OF J. AND J. SLEVEN,
APPELLANT,
vs.
LEANDER J. S. TURNEY AND ROBLEY D. ADAMS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS APPEAL.

And now comes the Appellees in this cause, by their attorney and enter their motion to dismiss the appeal in this cause, and for reasons for dismissing said Appellees assign the following:

FIRST, That all of the Defendants in this cause in the

Circuit Court do not join in this appeal.

SECOND, Because in the Circuit Court of the United States for the Southern District of Illinois, on the hearing of this cause, John Sleven, Thomas E. Sleven, John T. Sleven, August Trum and Anthony Shonter, were all Defendants, and all jointly answered the Complainants' petition filed therein; and the decree and final order and judgment in this cause, was against all of said parties, Defendants, and the order for appeal was in behalf of all of said parties Defendants; without an order of severance, and August Trum alone perfects his appeal in this cause.

R. P. HANNA, Atty. for Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS APPEAL.

A very brief statement of the case, and an inspection of the record, will show the propriety of the motion to dismiss the appeal in this cause.

In this cause Leander J. S. Turney and Robley D. Adams were made Complainants in the original petition, and John Sleven, Thomas E. Sleven, John T. Sleven, August Trum and Anthony Shonter were made Defendants, and all were duly served in said cause, and all joined in an answer to the Complainants' petition in the Circuit Court, and issue was made up as to all of said Defendants. (See page 6 of printed record.) All of

said Defendants in the original petition then joined in presenting to the Court a cross bill praying for affirmative relief; to this cross bill a demurer is sustained and the cross bill not having been ammended, the same is dismissed, and this cause proceeded to final hearing and decree on the issue joined on the original petition and answer. The final decree, and all interlocutory orders in the cause, equally affects all of the Defendants in the original petition.

After the rendition of the final decree by the Circuit Court, an appeal, is prayed by the Defendants, and an order is entered allowing the Defendants an appeal to the Supreme Court of the United States upon *their* entering into bond in the sum of $500, conditioned as required by law, within 90 days. (This order entered the 19th of May, 1886. See printed record 173.)

On the 5th day of August, 1886, August Trum, one of the two trustees and one of the five original Defendants, filed his appeal bond and perfects his appeal in this cause. There is no order of severance asked for or allowed in this cause, and the other four Defendants in the Court below are not known in this appeal. The interest of all of said Defendants were equally affected by the decree of the Circuit Court, and no reason is shown by the record in this cause why all of said Defendants do not join in this appeal. It is not shown by this

record that they were ever notified of the appeal, or were requested to join in the appeal and refused so to do.

On the motion to dismiss the appeal counsel for Appellees refer to

Masterson v Herndon, 10 Wallace 416.

Owings et al. v Kincannon, 7 Peters 399.

Todd v Daniel, 16 Peters 521.

From these authorities, and many others that might be cited, Appellees feel justified in asking that this appeal be dismissed.

R. P. HANNA,
Atty. for Appellees.

Robert Clarke & Co., Printers, Cincinnati.] [*January, 1890.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 243.

August Trum, Trustee of J. and J. Slevin & Co.,
Appellant,

vs.

Leander J. S. Turney and Robley D. Adams,
Appellees.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF FOR APPELLANT, RESISTING MOTION TO DISMISS APPEAL.

JOSEPH WILBY,
For Appellant.

KITTREDGE & WILBY,
J. M. PALMER,
Of Counsel.

Robert Clarke & Co., Printers, Cincinnati.] [*January, 1890.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

August Trum, Trustee of J. and J. Slevin & Co.,
Appellant.

vs.

Leander J. S. Turney and Robley D. Adams,
Appellees.

No. 243.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF FOR APPELLANT, RESISTING MOTION TO DISMISS APPEAL.

The ground of the motion is that all of the defendants have not joined in the appeal.

The objection lacks substance.

October 17, 1874, the bill was filed against John Slevin and James Slevin. (R., p. 2.)

Early in 1876 the Slevins went into bankruptcy, and their estate, including all their title to the real estate in question, became vested in John F. Slevin, August Trum,

and Anthony Shonter, as their trustees in bankruptcy. (Page 7, of this brief; also R., pp. 21 and 22.)

The amended bill, filed August 14, 1876, prayed that James Slevin, John Slevin, Thomas Slevin, and John F. Slevin, August Trum and Anthony Shonter be made defendants. (R., pp. 3 and 4.)

October 12, 1876, an answer was filed in the name of John Slevin and Thomas E. Slevin, and John F. Slevin, August Trum, and Anthony Shonter.

March 2, 1877, Thomas E. Slevin, John Slevin, James L. Slevin, John F. Slevin, August Trum, and Anthony Shonter filed a cross-bill against the complainants alleging, among other things (R., pp. 13–21), that James Slevin and John Slevin had been partners under the style of J. and J. Slevin, afterward J. and J. Slevin & Sons, and still later, J. and J. Slevin & Co.; and, as such partners, had acquired the real estate in question. That in April, 1872, James Slevin died, making Thomas E. Slevin the sole devisee of all his interest in and to the said real estate. That afterward, March 25, 1876, in the District Court of the United States for the Southern District of Ohio, J. and J. Slevin & Co. filed their proposition for composition; effected same; and, April 10, 1876, were adjudged bankrupts. That John F. Slevin, August Trum, and Anthony Shonter were appointed trustees of the said J. and J. Slevin & Co., and to them by deed the said real estate was conveyed. As an exhibit to this cross-bill was filed the certificate of the clerk of the said District Court, showing said bankruptcy proceedings and the title of said Slevin, Trum, and Shonter as trustees. (R., pp. 21 and 22.) The same exhibit shows a power of attorney by said trustees to James L. Slevin, which probably accounts for James L.

Slevin's presence as one of the complainants in this cross-bill.

June 20, 1877, the "trustees of J. and J. Slevin & Co." moved for and obtained leave to amend their cross-bill. (R., p. 24.)

The decree entered December 31, 1879, describes John F. Slevin, August Trum, and Anthony Shonter as the "trustees of J. and J. Slevin & Co." (R., p. 24.)

The notice of complainants to take evidence shows John F. Slevin, August Trum, and Anthony Shonter as "trustees of J. and J. Slevin & Co." (R., pp. 29 and 30.)

Archibald Merrielees testified that he was bookkeeper for the "trustees of the estate of J. and J. Slevin & Co. in bankruptcy," adjudicated as such in the United States District Court for the Southern District of Ohio, Western Division, case No. 1171. (R., pp. 47 and 48.)

The final decree was entered March 12, 1886.

At this time August Trum was the sole trustee of the Slevins in bankruptcy. This decree is against John Slevin, James Slevin, and "those holding under them." (R., pp. 170–173.)

The recital in the order allowing the appeal is that—

"The defendants pray an appeal." (R., p. 173.)

The appeal is perfected and the bond given by August Trum, as trustee of J. and J. Slevin & Co., bnkrupts. (R., p. 173.)

ARGUMENT.

The bankruptcy proceedings and the appointment of the trustees, all as above set forth in the various pleadings, is nowhere denied on the record. There is no finding to the contrary in any order or decree in the case.

If the Slevins went into bankruptcy in the spring of 1876, then their trustees became at that time, and continued to be, the proper and the only necessary parties defendant.

Section 5103, Rev. Stat. U. S. Settlement of bankrupt estates by trustees:

"And the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy."

Section 5047, Rev. Stat. U. S.:

"The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or any other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt."

Herndon v. *Howard*, 9 Wall. 664.

The record below shows that, at the time of the final decree and all interlocutory orders, all of the parties defendant, other than the three trustees, were *civiliter mortui*. They had no interest to be affected by any decree in the cause; and the presence of their names in the record is harmless surplusage.

> "The bankrupt had no interest to be affected except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided."
>
> *Buffington* v. *Harvey*, 95 U. S. 99, 103.

It follows that the Slevins have no interest in maintaining or reversing the decree; and, consequently, are not necessary parties to the appeal.

Basket v. *Hassell*, 107 U. S. 602, 608.

Railroad v. *Johnson*, 15 Wall. 8.

Also Equity Rule XLIX.

In addition to this showing in the record below, we have made it appear by evidence of the bankruptcy proceedings filed in this court (p. 7 of this brief), that there is sufficient cause for the non-joinder of the Slevins in this appeal. That such a showing removes the objection of such non-joinder is apparent from *Masterson* v. *Herndon*, 10 Wall. 416; that such a showing may be made in this court seems clear from *Herndon* v. *Howard*, 9 Wall. 664.

It remains to consider the non-joinder of John F. Slevin and Anthony Shorter Trum in the appeal.

Certified copies from the records of the Slevin bankruptcy proceedings in the United States District Court for the Southern District of Ohio, filed in this court in this cause and hereinafter set forth, pages 8–12, show:

1. The resignation of John F. Slevin as trustee in bankruptcy, February 24, 1879.

2. The appointment of Robert Beaton as trustee, to fill the place of Anthony Shonter, deceased, December 13, 1879.

3. The resignation and discharge of Robert Beaton as trustee, December 28, 1885.

4. The death of Anthony Shonter is further shown by certified copy of administration proceedings in the Probate Court of Hamilton county, Ohio, September, 30, 1879, filed in this court in this cause and hereinafter set forth, pages 12–14.

By which it is made to appear that, at the date of the final decree, March, 1886; of the allowance of the appeal; and of the perfection of the appeal and giving of the bond, August Trum was the sole trustee of these bankrupts.

Cause for the non-joinder of the said John F. Slevin and Anthony Shonter is thus sufficiently shown.

"When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen."

Section 5042, Rev. Stat. U. S.

We therefore submit that the fact is as disclosed by the record below, and as we have made it to appear by the proof filed in this court, that no party other than August Trum was affected by the final decree or any interlocutory order in this cause, and that sufficient cause has been shown why the defendants other than August Trum are not joined in this appeal.

The motion should be overruled.

JOSEPH WILBY,
For Appellant.

The following are on file in this Court, in this cause:

I.

DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

In the matter of J. & J. Slevin & Co., Bankrupts. *No.* 1711.

I, B. R. Cowen, clerk of the United States District Court, for the Southern District of Ohio, Western Division, do hereby certify that J. & J. Slevin & Co., bankrupts above named, filed on February 2d, 1876, in the said District Court, their petition and schedules according to law, asking to be declared bankrupts. That afterwards, on the 25th day of March, 1876, the said J. & J. Slevin & Co., in the same court and cause aforesaid, filed their proposition for a compromise, under section 5103 of the Revised Statutes of the United States; which compromise was effected and confirmed on April 10, 1876, by judgment and order entered upon the records in said cause in said court: whereby John F. Slevin, August Trum, and Anthony Shonter were duly appointed and qualified as trustees of said bankrupts. And to said Slevin, Trum and Shonter as Trustees, as aforesaid, by deeds of conveyance from John Slevin and wife and the heirs and devisees of James Slevin, deceased (including Thomas E. Slevin), and John Slevin, James L. Slevin, and said Thomas E. Slevin, the sole surviving members of the firm of J. & J. Slevin & Co., all the right, title, and interest, at law or in equity, of the said J. & J. Slevin & Co., or any member of said firm, or any of their heirs and devisees, in and to all the real estate of said firm and persons above named, including all their lands in the State of Illinois, was assigned, conveyed, and transferred to said John F. Slevin, August Trum, and Anthony Shonter. That thereafter, as appears by the order duly entered in said records in said cause, the said bankrupts were adjudged to have failed to carry out the provisions of their said compromise with their creditors, and were adjudged and decreed bankrupts; and the title, legal and equitable, to all said lands, became and was vested in said trustees, who were authorized and directed to administer the same by sale and distribution of the proceeds, according to the provisions of the bankrupt law of the United States. That thereafter, on February 24, 1879,

the said John F. Slevin was removed as trustee as aforesaid. That thereafter, on December 13, 1879, Anthony Shouter having deceased, Robert Beaton was appointed in his place. That thereafter, in January, 1886, said Robert Beaton resigned, and was removed and discharged as such trustee: and said August Trum thereupon became, has continued ever since to be and is now, the sole trustee of said bankrupts, engaged under the orders of this court in administering as trustee, the estate, real and personal, of the said J. & J. Slevin & Company, bankrupts.

The foregoing appears at length and in detail in the records of said bankruptcy proceedings in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, Ohio, this 25th day of January, A. D. 1890.

[SEAL.] B. R. COWEN, *Clerk.*
By R. C. GEORGI, *Deputy.*

II.

On Monday, the 24th day of February, A. D. 1879, among the proceedings had were the following, to wit:

In the Matter of J. & J. Slevin & Co., Bankrupts.

IN BANKRUPTCY.

And now, this day, the petition of Robert Beaton and other creditors of the said J. & J. Slevin & Co., filed on the ——— day of ———, A. D. 1878, for the removal of John F. Slevin as one of the trustees of said J. & J. Slevin & Co., bankrupts, and also the resignation, in writing, of the said John F. Slevin as one of such trustees, bearing date January 31, 1879, and herein filed, came duly on to be heard, upon the exhibits, proof, and testimony, and was argued by counsel; and the court, being fully advised in the premises, finds that the said John F. Slevin was duly served with process, and notified of the filing and pendency of the said petition, and that he now tenders to the court here his resignation, in writing, as one of the trustees of the said J. & J. Slevin & Co., bankrupts, bearing date January 31, 1879. Therefore, in consideration of the premises, and for good cause shown, it is hereby ordered, adjudged, and decreed by the court that the resignation of the said John F. Slevin, as one of the trustees of the said J. & J. Slevin & Co., bankrupts, be and the

same is hereby accepted and approved, and the said John F. Slevin is hereby requested, ordered, and directed to execute and deliver, within five days from the presentation to him for that purpose, a deed or deeds of conveyance, and such other instruments in writing as may be requisite and necessary, or as may hereafter be directed and ordered by the court, to assign, convey, and transfer to August Trum and Anthony Shonter, surviving trustees of the said J. & J. Slevin & Co., bankrupts, their heirs and assigns, or to the survivor of them, his heirs or assigns, or to their successor or successors, his or their heirs or assigns trustees as aforesaid, all his right, title, and interest in all and singular the assets, property, and effects, and whether real, personal, or mixed, the title to which or interest therein he holds, possesses, or claims by virtue of, and as one of the trustees of, the said bankrupts, J. & J. Slevin & Co., and whether individually or as a firm, such deed or deeds and instruments in writing, to be, however, prepared by the said surviving trustees, and presented to the said J. F. Slevin for his execution.

And it is further ordered, adjudged, and decreed by the court that, should the said John F. Slevin neglect or refuse to execute and deliver such deed or deeds and instruments in writing, on proper demand being made as aforesaid, then and in such case this judgment, decree, and order shall stand and be taken for such assignment, conveyance and transfer, to all intents and purposes, as though the said J. F. Slevin had duly executed the same, and he is hereby perpetually enjoined and forever barred from setting up or claiming any right, title, or interest in or to the assets, property, and effects aforesaid; and the said August Trum and Anthony Shonter, surviving trustees aforesaid, are hereby clothed with full power and authority in the premises, to all intents and purposes, as if the original conveyance, transfer and assignment, confirmation and approval, had been made to them alone and on their behalf solely as trustees.

And it is further ordered and adjudged by the court that the sum of $250 be, and the same is hereby allowed to the said John F. Slevin as and for his reasonable compensation and salary for his services rendered as such trustee, in addition to the $1,500 which he has already received; said sum of $250, however, to be in full of all his claim for compensation and salary in connection with the trust; and the said surviving trustees are hereby ordered and directed to pay the same on delivery to them of the deeds and in-

struments in writing hereinbefore mentioned; and also to pay the costs of this proceeding, to be taxed by the clerk.

UNITED STATES OF AMERICA. }
SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION. } *ss.*

I, Benjamin R. Cowen, clerk of the District Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24th day of January, A. D. 1890.

[SEAL.] B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

III.

On Saturday, the 13th day of December, 1879, among the proceedings had were the following, to wit:

In the matter of J. & J. Slevin & Co., Bankrupts.

IN BANKRUPTCY.

Upon application of the creditors and consideration of the premises, the court appoint Robert Beaton an additional trustee in this case in place of A. Shonter, deceased, and orders that the two trustees be vested and exercise all powers vested in the trustees originally appointed. And the court orders that the said Robert Beaton and August Trum as trustees execute and file herein their several bond in the sum of twenty-five thousand dollars each, with security to be approved by the court for the faithful discharge of their duties as such trustees; said bonds to be to the United States of America for the benefit of the creditors of J. & J. Slevin & Co.

UNITED STATES OF AMERICA. }
SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION. } *ss.*

I, Benjamin R. Cowen, clerk of the District Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is

truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24th day of January, A. D. 1890.

[SEAL.] B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

IV.

On Monday, the 28th day of December, A. D. 1885, among the proceedings had were the following, to wit:

In the Matter of J. & J. Slevin, Bankrupts.

IN BANKRUPTCY.

And now came Robert Beaton, one of the trustees of J. & J. Slevin & Co., bankrupts, herein before appointed by the court, and tendered to the court his resignation in writing, and asks that the same be accepted, to take effect on January 7, 1886; and the court hereby accepts said resignation, and said Beaton is hereby discharged from further duty as such trustee, from and after January 7, 1886, subject to the filing of his final account as hereinafter provided. And, it appearing that the said Beaton has not yet filed a final report and account of his acts as such trustee, leave is hereby given to said Beaton to file with the court, on or before said January 1, 1886, and before the taking effect of his resignation, his final account as aforesaid.

And it is hereby ordered, that on and after the taking effect of said Beaton's resignation as aforesaid, the remaining trustee herein, August Trum, shall have, as sole trustee of and for said J. & J. Slevin & Co., bankrupts, full power to execute deeds, leases, and all conveyances and incumbrances of land and other property, wherever situated, that may be necessary, and to do and perform all other matters and things that may be necessary to be done in the further business of operating and administering this trust; and such further order as may be necessary and proper fixing the compensation of said Beaton up to the filing of said account, is hereby reserved until the filing and settlement of his account herein. If said account be not filed on or before January 7, 1886, said resignation shall, by the force of this order, take effect upon the filing of the same,

provided it be filed on or before January 9, 1886, and it is ordered that said Beaton file said account with the least possible delay, and not later than January 9, 1886.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, } ss.

I, Benjamin R. Cowen, clerk of the District Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court; and that said Beaton's report was filed on January 9, 1886.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24th day of January, A. D. 1890.

[SEAL.] B. R. COWEN, *Clerk.*
By R. C. GEORGI, *Deputy.*

V.

In Re Estate of Anthony Shonter.

LETTERS OF ADMINISTRATION, NO. 23,430.

On application, the court grants unto Herman P. Goebel letters of administration on the estate of Anthony Shonter, late of this county, deceased.

Whereupon ("widow of decedent having relinquished her right to administer upon said estate of decedent"), he accepted said appointment, and filed a statement of the whole estate of said decedent, and presented his bond as such administrator, in the sum of $60,000, with Peter F. Striker and Charles Robson as sureties, which bond is approved as sufficient. Letters issued.

ISAAC B. MATSON, *Probate Judge.*

THE STATE OF OHIO,
HAMILTON COUNTY, } ss.

To all who shall see these presents, greeting:

Whereas, Anthony Shonter, late of the county of Hamilton and State of Ohio, died intestate, whereby it becomes expedient that the Probate Court within and for the county aforesaid, should appoint some suitable and trusty person or persons, to collect and administer, all and singu-

lar, the goods, chattels, and credits of the said Anthony Shonter, deceased, whereof he died possessed,

Know ye therefore, That the said Probate Court has nominated and appointed, and by these presents does nominate and appoint, Herman P. Goebel administrator of all and singular the goods, chattels, and credits of the deceased; hereby granting unto said administrator all and singular the power necessary, and by law required, to enable him to make an inventory of, collect, sue for, and recover, all and singular, the goods, chattels, and credits of the said deceased; and out of the same, or such part thereof as shall come to his hands, the debts of the said deceased to pay and discharge, according to law; and of the rest and residue of said goods, chattels, and credits, to make a just and lawful distribution, and the same fully to administer in all things as by law required.

And the court does appoint Amzi McGill, A. J. Letus, and August Trum to appraise, on their oath or affirmation, all and singular, the goods, chattels, and credits of the said deceased.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said Probate Court, at Cincinnati, this 30th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] ISAAC B. MATSON, *Probate Judge.*

THE STATE OF OHIO, } ss. PROBATE COURT.
HAMILTON COUNTY. }

I, Herman P. Goebel, sole judge and ex-officio clerk of the Probate Court, within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy of the entry granting letters of administration to Herman P. Goebel, also true and correct copy of letters of administration granted unto said Herman P. Goebel, *in re* Estate of Anthony Shonter, deceased, as the same appear from the records and files of said court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Cincinnati, this 25th day of January, A. D. 1890.

[SEAL.] HERMAN P. GOEBEL,
Probate Judge and Ex-officio Clerk.

THE STATE OF OHIO. } ss. PROBATE COURT.
HAMILTON COUNTY. }

I, Herman P. Goebel, sole judge of the Probate Court, within and for said county, the same being a court of law

and record, hereby certify that the signature attached to the above certificate purporting to be that of Herman P. Goebel, is his genuine signature; and that he was at the time thereof ex-officio clerk of said Probate Court; and as such, full faith and credit are due all his acts; and that the attestation of said clerk is in due form of law, and by the proper officer.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Cincinnati, this 25th day of January, A. D. 1890.

[SEAL.] HERMAN P. GOEBEL, *Probate Judge.*

THE STATE OF OHIO, } ss. PROBATE COURT.
HAMILTON COUNTY. }

I, Herman P. Goebel, clerk of the Probate Court, within and for said county, the same being a court of law and record, hereby certify that the signature attached to the above certificate, purporting to be that of Herman P. Goebel, is his genuine signature; and that he was at the time thereof judge of said Probate Court; and as such, full faith and credit are due all his official acts.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, at Cincinnati, this 25th day of January, A. D. 1890.

[SEAL.] HERMAN P. GOEBEL,
Clerk of Probate Court.

Office Supreme Court U. S.
FILED,
JAN 23 1890
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers.] [*January, 1890.*

Supreme Court of the United States

OCTOBER TERM, 1889.

No. 243.

August Trum, Trustee of J. and J. Slevin & Co.,
Appellant,

vs.

Leander J. S. Turney and Robley D. Adams,
Appellees.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

ASSIGNMENT OF ERRORS AND ARGUMENT FOR APPELLANT.

1. QUI CAUSA DECEDIT, CAUSA CADIT.
—Holkerstone's Maxims, 141.

2. ALIUD EST POSSIDERE; ALIUD ESSE IN POSSESSIONE.
—Hobart, 103.

JOSEPH WILBY,
For Appellant.

KITTREDGE & WILBY,
J. M. PALMER,
Of Counsel.

Robert Clarke & Co., Printers.] [January, 1890.

SUPREME COURT OF THE UNITED STATES

August Trum, Trustee of J. and J. Slevin & Co.,
Appellant,

vs.

Leander J. S. Turney and Robley D. Adams,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of the United States for the Southern District of Illinois, and involves about three hundred and sixty acres of land in Wayne county, Illinois.

The appellant is the trustee in bankruptcy of J. and J. Slevin & Co., in this brief hereinafter described as the "Slevins," who, as well as the appellant, are or were citizens and residents of the State of Ohio; the appellees are citizens and residents of the State of Illinois.

The proceedings originated in the state courts of Illinois, and were removed to the Circuit Court of the United States. (R., pp. 9, 10, and 11.)

The original bill was filed on the 17th of October, 1874, by Leander J. S. Turney against the Slevins, and was entitled "Bill to remove cloud on title and quiet title." It alleged that Turney was the owner in fee-simple of the lands in question; that he was then in possession of the same; that the Slevins pretended to be the owners of the said lands, under a decree of foreclosure and master's deed; that the Slevins' title was void in law and equity, and was a cloud on the title of the complainant; and that the said deed was prejudicial to the rights of the complainant and to his title; and the prayer of the bill was that the pretended deed so held by the Slevins be set aside and canceled, and the title of complainant be quieted. (R., pp. 1 and 2.)

August 14, 1876, Turney, and also Robley D. Adams, presented in the same cause an amended bill, alleging that, on the 1st of January, 1853, Turney was the owner in fee-simple of the lands in question, and continued to be the lawful and equitable owner of the same down to April 15, 1874, when, it was alleged, Turney conveyed the same to the said Robley D. Adams; that said Adams thereupon became the owner in fee-simple of said lands, and had possession of the same; that on the 22d of July, 1863, the Slevins placed upon the records of Wayne county, Illinois, a deed purporting to be made by Barkley, Special Master Commissioner, under decree of August term, 1860, conveying the lands in question to the Slevins; that the conveyance from Turney to Adams warranted the lands to be free from incumbrance; that there was no such decree at the August term, 1860, or at any other time, authorizing said deed to the Slevins, nor was there any authority in Barkley to convey the said lands to them; that said deed, being without authority of law, was void, and a cloud

upon the title of Robley D. Adams, and damaged the sale of the land, and caused purchasers to believe that the title to the said land was not clear and perfect in the complainants; and the prayer of this amended bill was, that the title of the complainants in the said lands should be decreed free and perfect and clear of all incumbrances by reason of the said deed by Barkley to the Slevins, and that the said deed be declared null and void and a cloud upon the title of the said Robley D. Adams. (R., pp. 2, 3, 4.)

The Slevins, and their trustees in bankruptcy, filed, October 12, 1876, their answer to this bill (R., pp. 6, 7, and 8), admitting that, on the 1st of January, 1853, Turney was the owner of the lands; but the answer alleged that, on November 21, 1853, he had mortgaged them to the Slevins, to secure $2,000; that, afterward, on the 21st of July, 1863, Barkley, as Master, under certain foreclosure proceedings, conveyed the lands to the Slevins by deed which was duly recorded; that there was another mortgage deed, 6th of December, 1851, by Turney to one Eldridge, and still a third mortgage, dated July 30, 1853, by Turney to Edwin Beecher, both on the lands in question; and that, upon foreclosure of all three of these mortgages, the Slevins purchased the lands in question, and continued, under deed of the same, in continuous possession thereof for more than seven years since July 21, 1863; that, on June 10, 1862, the lands in question were conveyed to the Slevins by the Sheriff of Wayne county, Illinois, by a tax deed which was duly recorded.

The answer denied that the deeds of the Slevins were a cloud upon the title of complainants, and alleged that in truth and fact the Slevins were the legal and equitable owners of the land, and that they had been, and were

then, in constructive possession of the same, and had paid all the taxes assessed thereon since the year 1859.

The answer denied that either of the complainants had any interest whatever in the lands.

The answer specifically denied that Turney was the owner of the lands down to April 15, 1875; and denied that Adams was in possession; it averred that Adams paid no consideration for the lands, and took his deed with full knowledge of the rights of the Slevins and of their possession.

The answer further denied every material allegation in the bill except as admitted; and prayed that defendants be discharged with costs.

Thereafter, the cause was removed, on the petition of Turney and Adams, to the United States Circuit Court, as above stated, and the papers were filed in the Federal Court, January 2, 1877.

On March 2, 1877, a stipulation was filed in the cause in the Circuit Court of the United States (R., pp. 11 and 12), waving objections to the removal proceedings, on account of time of filing the same; and, in consideration of that waiver, the complainants agreed that the Slevins might file, in the United States Court, their cross-bill; and it was further agreed that, in that cross-bill, any omission in the records of the Illinois courts, in proceedings relevant to the subject-matter, might be rectified in the United States Court in the same manner as if a petition had been filed for the purpose in the state court, under the statutes of Illinois, in such case made and provided.

Accordingly, on the same day, March 2, 1877, the Slevins, and their trustees in bankruptcy, filed in the said cause, as removed to the United States Court, their cross-

bill against Turney and Adams, reciting again, as in their answer, but more particularly, the foreclosure proceedings in the state courts, under the three several mortgages on the lands in question; alleging decrees of foreclosure in each; alleging the sale of the lands in each of these foreclosure proceedings to Charles A. Beecher, who received certificates of purchase therefor; alleging that these certificates of purchase were duly assigned to the Slevins; and that the premises described therein not being redeemed by Turney according to law, the same were conveyed by Barkley aforesaid, as Master, to the Slevins. That, in 1858, said Turney filed a motion to set aside said sales; and that afterward, at the August Term, 1860, upon final hearing of the said application of said Turney, and by consent of all the parties, all these said sales were set aside, and a re-sale of the said premises ordered in each of the three foreclosure proceedings. That such decree in each of the cases, as well as the supplemental decree and order of August Term, 1860, were presented to the court and approved at the said August Term, 1860; and that said decrees, and particularly that of August Term, 1860, fully protected all the rights of Turney in the premises, and conveyed all his right, title and interest in the said mortgaged premises to the Slevins, as the same fully appears by the recitals in the deeds from said Barkley, as Master, to the Slevins. (These deeds may be found in the Record, pp. 50 to 56 inclusive.)

The cross-bill further alleged that the Slevins had possession of the lands in question ever since they acquired title by conveyance pursuant to decree of August, 1860, and sale thereunder; and that they had acquired title by virtue of said deed and by virtue of said decree of August, 1860.

The cross-bill further alleged that, at the time Turney filed his bill to remove cloud, he had no title to the lands in question, and that at the time of his conveyance to Adams, who filed the amended bill with Turney in this cause, Adams knew that Turney had no title, and that he, Adams, was receiving no title by said conveyance. But that he, Adams, intended by said conveyance to cloud the title of the Slevins by the record of said deed, with a view to extract money from the Slevins, and to compel them to buy the said trumped-up title, for which said Adams paid no consideration; and that Adams had full notice of the existence of the Slevins' title at the time, and knew that the same was matter of public record in Wayne county ever since July 22, 1863, which was eleven years prior to his, Adams's, deed from Turney; and also, that the date at which Adams took his deed from Turney was two years after Turney had filed his bill in this cause to remove cloud.

The cross-bill also proceeded, under the stipulation of March 2, 1877, to allege that the original decrees, above specified, in the three foreclosure cases, had been lost, stolen, or destroyed; that diligent search had been made for them and they could not be found; that the deeds to the Slevins which had been executed prior to the decree of August term, 1860, had also disappeared; and that they, the Slevins, filed this, their cross-bill, among other things, to complete and perfect their title to the aforesaid real estate by reason of the loss of the records and documents aforesaid, as well as to remove any cloud on their title by reason of the action of Turney and Adams in the premises. And the cross-bill prayed that the decree of August term, 1860, might be proved, established, and spread upon the records by decree in this cause, perfecting the evidences

of the Slevins' title against the loss of the original papers, and that any title Turney or his grantees might have had, should be also in this cause extinguished.

The verification of the cross-bill makes oath to the existence of the foreclosure proceedings; that the original decree in the said foreclosure causes had been stolen, lost, or destroyed; that certified copies could not be had; that said decree is fully set out in the recitals of the deeds to which reference has heretofore been made (which may be found on pages 50 to 56, inclusive, of the Record); and that the loss or destruction stated occurred without the fault or neglect of the Slevins, and that, unless supplied, may result in damage to them.

The other allegations in the bill are sworn to upon belief. (R., pp. 13 to 21, inclusive.)

On the 2d of April, 1877, on failure of Turney and Adams to answer, a decree *pro confesso* on the cross-bill was entered against them. (R., pp. 22 and 23.)

On April 10, 1877, Turney and Adams filed their demurrer to the cross-bill for want of equity, want of jurisdiction, and other grounds. (R., p. 23.)

On the next day, April 11th, an order was entered setting aside the *pro confesso* decree on the cross-bill, and sustaining the demurrer to the same. Upon what ground the demurrer is sustained, is not stated. (R., p. 24.)

Thereafter, both parties got leave to amend their bill and cross-bill, respectively.

Neither bill nor cross-bill, however, appear to have been amended; but some three years afterward, on December 31, 1879, a decree was entered (R., pp. 24 to 26, inclusive), reciting that the parties came and the cause came on for hearing upon the petition, the answer thereto, and the

cross-bill. No evidence appears to have been offered, but the court proceeded to find—

That, during the pendency of this suit, Turney had conveyed all his interest in the lands to Adams, who was now the lawful and equitable owner of the premises;

That the deeds of July 21, 1863, by Barkley to the Slevins, were without authority, and absolutely null and void, and a cloud upon the title of Adams, whom they decreed to be the owner in fee-simple of all the said lands.

[By way of explanation it might be stated here, that the conveyance to Slevins by Barkley Master, dated July 21, 1863, appears in two deeds by reason of the fact that part of the lands in controversy is embraced in one and the balance in the other. (R., pp. 50 to 56, inclusive.)]

This decree of December 31, 1879, adjudged that the Slevins and their representatives be restored to all their legal and equitable rights under their mortgages; and, having thus attempted to define the status of the Slevins to be that of mortgagees, and not owners, of the premises, the court proceeded to prescribe the rule of debits and credits according to which an account should be stated between Adams and the Slevins, and referred the cause to Jones, as Master, to take and report the evidence pursuant to the findings of the court.

On the 16th of September, 1880, Jones made his report (R., p. 27), which simply consisted of a statement of what evidence he had taken.

Then, after considerable delay, on the 27th of December, 1884, the court appears to have entered another order of reference, referring the cause to Bluford Wilson. (R., pp. 28 and 29.)

Whether the former Master, Jones, was ever dis-

charged, does not appear; but Wilson was ordered to pursue substantially the line of inquiry directed and indicated by the decree of December 31, 1879, but with this notable addition not contained in the prior decree; for Wilson was ordered not only to inquire how much the Slevins had received for rents and profits of the lands in question, but also how much in rents and profits the Slevins might have received from these lands by reasonable care and prudence.

The order also au. ıorized an inquiry into the value of the waste, if any, in the removal of fences and buildings by the Slevins.

Thereupon, Wilson, as Master, conducted the examination under this order; and on the 18th of May, 1885, filed his report in this cause. (R., pp. 151 to 168, inclusive.)

The main features of this report are as follows:

1. It found the amount of the mortgages that the Slevins had held on these lands, and the dates and rate of interest.

2. It found that the Slevins had paid taxes on the lands for every year from 1863 to 1884.

3. It found that the Slevins had expended $404.06 at various times as costs of various court proceedings connected with the premises.

4. It found that the Slevins had received in all $2,800 from the sale, at various times, of parts of the property in question.

5. It found that the Slevins, through their agents, had been in actual, open, visible possession of the premises from the date of their deeds, July 21, 1863, down to the 31st of December, 1879, with the exception of two or three

months in the year 1874, when Turney had forcible possession of the same. (R., p. 160.)

It then proceeded to deal with the Slevins as mortgagees in possession.

6. It found that though with the exception of one tenant, who seemed to have paid the taxes on the premises he occupied in lieu of rent, no rent was actually received by the Slevins, or their agents, and though no receipts for rent were either produced in evidence or mentioned by any witness, that, nevertheless, although no rent or profit might have been in fact received by the Slevins, they were bound to account for what the property would produce if managed with prudence; and thereupon, after finding that the land not shown by the testimony to have been covered with brush or timber amounted to two hundred and seventy acres, it undertook to charge the Slevins with such rent per annum for the whole two hundred and seventy acres as the Master thought the Slevins might have received by the exercise of reasonable care and prudence. And this rental is, by the account, fixed and charged at $350.00, for every year from July 21, 1863, to the 23d of April, 1873, in addition to, and not diminished by any credit for, the taxes and repairs actually paid by the Slevins during the same years.

In 1873, forty acres were sold by the Slevins to one Holmes; so that from that time down to December 31, 1879, the report charges the Slevins with a proportionately reduced rental, amounting to $311.12 per annum.

7. The report also charges the Slevins as for waste in several items:

For buildings removed.....	$250 00
For fences permitted to be hauled away, one-third the value of the new one.	350 00
For timber cut and removed.....	210 00
In all.....	$810 00

And as a result of the computation and statement of account upon such theory and findings, the report finds a balance due from the Slevins to Turney and Adams of $77.58. The items of alleged waste and imputed rent having not only absorbed the interest upon the mortgage deed, but having swallowed the mortgage debt itself and $77.58 besides.

The Slevins filed exceptions to this report (R., pp. 169 and 170), complaining, among other things, of the rule adopted by the Master in charging them, not upon the basis of rents and profits actually received, but for such rents and profits as they might have received by the exercise of reasonable care and prudence.

Complaining, also, that the Master had charged them with the natural decay of improvements upon the lands, and for the cutting and removal of timber from the land, as for waste committed.

Complaining also that the Master had found a balance against the Slevins in the sum of $77.58.

Complaining also that the findings and conclusions of the Master were unwarranted by the evidence; and also complaining that the findings and conclusions of the Master contained in his said report were beyond the scope of the order referring the cause.

Finally, the cause thereafter came on for hearing upon the report and the exceptions; the exceptions were overruled and the court proceeded to enter a decree based upon the report of the Master, finding the three mortgages to the Slevins, and the amount due thereon, together with all interest and costs and all taxes paid by the Slevins; that on the 21st of July, 1863, the Slevins as mortgagees took possession of the lands in question, and re-

mained in possession of the same by themselves or their tenants, as mortgagees in possession, until the 31st of December, 1879; and that the lands were all under fence and susceptible of cultivation at the time of taking possession of the same, and that the rents and profits derived from the lands and that might have been derived from the lands by prudent management of the same, amount to two dollars ($2.00) per acre per annum, or $1.50 per acre per annum over and above taxes and necessary repairs to keep and preserve the estate.

The court further found waste, as reported by the Master, aggregating $810.00, and that from sales of parts of the premises the Slevins had received $2,800.00.

And the court further found that the amount that was received, or might have been received by the Slevins by prudent management of the lands while in possession of the same, for rent from said lands and from the waste committed by the Slevins, and from the moneys received from Holmes, Barkley, and Ryder for the sale of portions of the lands, amounted in the aggregate to $77.58 more than the amount due to the Slevins on the three mortgages.

And decreed that the title to all the said lands not disposed of as mentioned in the decree, was in Robley D. Adams, free and clear of all liens or incumbrances by virtue of said mortgages, and the same were ordered satisfied. (R., pp. 170–173.)

Thereupon, on the 19th of May, 1886, Mr. Trumm, as trustee of the Slevins, prayed and was allowed an appeal in these proceedings to the Supreme Court of the United States. (R., p. 173.)

ASSIGNMENT OF ERRORS.

The appellant assigns for error:

1. The action of the court below in entering its decree of December 31, 1879, and in referring the cause to a Master, as therein specified.

2. The action of the court below in its order of December 27, 1884, in referring the cause to Bluford Wilson, Master.

3. The action of the court in its final decree, dated March 12, 1886.

4. Appellant assigns for error the action of the court below in its decree of December 31, 1879, as follows:

a. In finding that Robley D. Adams is, or was, the lawful and equitable owner of the lands described in the proceedings herein.

b. In finding that the deed executed on the 21st of July, 1863, by Joseph D. Barkley, Master in Chancery, to the Slevins, and recorded in Book P., pages 327, 328, 329, and 330, and the other deed, dated July 21, 1863, by said Barkley to said Slevins, recorded in Deed Book P., pages 330 to 339 of the Records of Wayne County, Illinois, were both, or either of them, executed or made without lawful authority in said Barkley for so doing.

c. In decreeing that both of said deeds, and all other deeds to said Slevins, of said lands, are absolutely null and void, and are a cloud upon the title of the complainant, Robley D. Adams.

d. In decreeing that said Adams is, or was, the lawful and equitable owner of all, or any, of said real estate, in fee-simple, or otherwise.

e. In adjudging and decreeing that the Slevins and their legal representatives be restored to their rights under their mortgages on said lands.

f. In decreeing that from the amount due on said mortgages, and the taxes and costs paid by the Slevins on said lands, shall be deducted all rents and profits derived by said Slevins during the time they, or those under them, had been in possession of the same or any part thereof; and in deducting therefrom for valuable improvements removed from said premises or destroyed since the Slevins first took possession of the same; and in deducting therefrom all moneys received by the Slevins.

g. In decreeing that the Slevins and their agents and attorneys shall surrender immediate possession of the lands, or any part thereof, in these proceedings, to Robley D. Adams.

h. In referring the cause to John A. Jones, Master, to take and report the evidence according to the said decree, and upon the theory of the liability of the said Slevins as mortgagees in possession.

5. Appellant also assigns for error the action of the court below in its order of the 27th of December, 1884, in referring and submitting to the Master the inquiry and ascertainment of any and all of the matters therein set forth, the said inquiry not being shown by, or pertinent to the proceedings made upon the pleadings in this cause or in evidence therein; the said Slevins not being, and never having been, mortgagees in possession of said lands. And particularly, appellant assigns for error that part of the 4th clause of said order of reference wherein the Master is directed to inquire how much, in rents and profits, might they—the Slevins—have received from said lands by reasonable care and prudence.

6. Appellant also assigns for error the action of the court below in overruling the exceptions, and each of them, of the Slevins to the report of the Master filed herein, which exceptions were filed June 26, 1885 (R., pp. 169, 170), and which report was filed May 18, 1885 (R., p. 168.)

7. Appellant assigns for error the action of the court below in finding, in accordance with the findings of the Master in said report, that the liability of the said Slevins was that of mortgagees in possession at any time; and in finding the state of the account upon this theory of the Master, and as stated and reported by the Master in his report.

8. Appellant assigns for error the action of the court below in finding and decreeing, in its decree of the 12th of March, 1886, that the Slevins, in taking and holding possession of the lands in question, on the 21st of July, 1863, or at any other time, took, held, or remained in possession, as mortgagees.

9. Appellant assigns for error the action of the court below, in the same final decree, in holding and decreeing the Slevins to be, or to have been, mortgagees in possession, or chargeable or responsible as such.

10. Appellant also assigns for error the action of the court below, in the same final decree, in finding and decreeing that the said Slevins, or their legal representatives, are chargeable with the sum of $2 per acre, or $1.50 per acre per annum over and above taxes and necessary repairs to keep and preserve the estate, as rents and profits that might have been derived from said lands by prudent management of the same; or in decreeing or finding that the Slevins, or their representatives, are liable for any sums

whatever as rents or profits that might have been derived from said lands by prudent management of the same.

11. Appellant assigns for error the action of the court below, in the same final decree, in finding and decreeing that the said lands were all under fence, and susceptible of cultivation at the time of taking possession of the same; and in finding and decreeing in said decree that waste was committed by the Slevins on said lands; or that any buildings were removed or destroyed by them while they were in possession of said lands; or that any timber was destroyed or removed by said Slevins from said lands; or that said waste aggregated in value the sum of $810, or any sum whatever.

12. And the appellant also assigns for error the action of the court below, in said final decree, in finding that the items, or any of them, mentioned by the said Master in his said report as chargeable against the said Slevins, should be charged or credited against the amount of their mortages and interest thereon.

13. Appellant also assigns for error the action of the court below, in said final decree, in adjudging and decreeing the title to the said lands, or any part of them, to be in said complainant, Robley D. Adams.

14. Appellant also assigns as error that said report of the Master and his findings are contrary to the evidence, contrary to law, not sustained by the evidence, and not warranted by the pleadings in this cause.

15. Appellant assigns for error that the reference to said Master, and the orders and decrees referring the cause to the Master, and each of them, in this cause, were, and are, erroneous, contrary to law, not justified by the evidence, and not warranted by the pleadings in this cause.

16. Appellant assigns for error that the several decrees

above mentioned, and each of them, were contrary to the evidence, against the weight of the evidence, contrary to law, and not warranted by the pleadings in this cause.

17. Appellant assigns for error the action of the court below in not discharging the respondents to the bill below, and in not dismissing the bill and amended bill of the complainants below, and in dismissing the cross-bill of the Slevins, and in not granting the relief prayed for by the Slevins in their said cross-bill, that the lost evidence of their title should be restored.

ARGUMENT.

The cause was heard upon the bill, the answer and the cross-bill. (R., p. 25 at top.) The amended bill says there was no decree authorizing the deed to the Slevins, and that the said deed is void. These are averments of conclusions, and no facts to support them are alleged. The amended bill also alleges that Adams is the owner of the lands by conveyance from Turney, and in the possession of Adams. (R., p. 3.) The bill is not sworn to.

The answer (R., pp. 6, 7, 8) denies these allegations of the bill of the ownership by Turney or Adams; of Adams' possession; and that the deed to the Slevins is void; and in support of that denial, sets forth in detail the foreclosure proceedings, the purchase and deeds thereunder. The answer is not sworn to. No replication was filed to the answer.

Upon this state of the case it was improper to enter a decree that the said deeds to the Slevins were void, and that Adams was the owner of the property. For there

was no evidence of that ownership, or that the deeds were void. Where a complainant, instead of filing a general replication denying the allegations of the answer, sets down the cause for hearing upon bill and answer, this is an admission that every thing well pleaded in the answer and responsive to the bill is proved.

Parton v. *Prang*, U. S. C. C. Mass. (2 Off. Gaz.) 619.

The affirmative allegations of the bill that the deeds to the Slevins were void is denied by the answer. The bill should therefore have been dismissed.

United States v. *Scott*, 3 Woods (C. C.), 334, where, in a bill claiming relief against a deed alleged to be fraudulent, the court say, page 336:

"The defendants answered the bill fully, denying all fraudulent intent, averring that the deed was *bona fide* and for full consideration. . . . The plaintiff set the cause down for hearing on bill and answer only, and the answer must be taken as true. The charge of fraud being purged by the answer, and the bill being unsupported by evidence, the bill must be dismissed."

So, in *Leeds* v. *Ins. Co.*, 2 Wheat. 380, it was held:

"Where a cause is set down for hearing upon the bill, answer and exhibits, without other pleadings, the whole of the answer must be considered as true."

See also 1 Hoff. Ch. Pr. 235.

In *Bank* v. *Geary*, 5 Peters, 98, the rule is laid down that in chancery an answer not under oath is considered as a denial of the allegation of the bill analogous to the general issue at law, and puts the complainant to proof of the allegations of his bill.

The decree of December 31, 1879, recites that it came on to be heard not only on bill and answer, but also on the cross-bill of the Slevins. If that be so, then in addition to the considerations above mentioned, the complainant's case was met with still more detailed statement of the Slevins title and their deeds to the lands in question. And this cross-bill is sworn to. The purpose of this cross-bill was to accomplish what could not be done by an answer, namely, to bring onto the record the statement of the loss of certain title papers, the circumstances of that loss, and a prayer for a decree re-establishing them as provided by the statute of Illinois, as follows:

Sec. 1. Whenever the record of any judgment or decree, or other proceeding, of any judicial court of this state, or any part of the record of any judicial proceeding, shall have been or shall hereafter be lost or destroyed, any party or person interested therein may, on application by petition, in writing, under oath, to such court, and on showing, to the satisfaction of such court, that the same has been lost or destroyed without fault or neglect on the part of the person making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record where the same can be obtained; which certified copy shall, thereafter, have the same effect as such original record would have had, in all respects.

Sec. 2. That whenever the loss or destruction of any such record or part thereof shall have happened, or shall hereafter happen, and such defect can not be supplied, as provided in the next preceding section, any party or person interested therein may make a written application to the court to which such record belonged, verified by affidavit or affidavits, showing the loss or destruction thereof, and that certified copies thereof can not be obtained by the party or person making such application, and the substance of the record so lost or destroyed, and that such loss or destruction occurred without the fault or neglect of the party or person making such application, and that the loss or destruction of such record, unless supplied, will or

may result in damage to the party or person making such application; and thereupon said court shall cause said application to be entered of record in said court, and due notice of said application shall be given, as in chancery cases, that said application will be heard by said court. And if, upon such hearing, said court shall be satisfied that the statements contained in said application are true, said court shall make an order, reciting what was the substance and effect of said lost or destroyed record; which order shall be entered of record in said court, and have the same effect which said original record would have had if the same had not been lost or destroyed, so far as concerns the party or person making such application and the persons who shall have been notified, as provided for in this section.

Par. 15, Sec. 10. In case of such destruction of records, as aforesaid, any and all courts in such county having chancery jurisdiction shall have power to inquire into the condition of any title to or interest in any land in such county, and to make all such orders, judgments and decrees, as may be necessary to determine and establish said title or interest, legal or equitable, against all persons known or unknown, and all liens existing on such land, whether by statute, judgment, mortgage, deed of trust or otherwise.

Par. 16, Sec. 11. It shall be lawful for any person claiming title to any lands in such county at the time of the destruction of such records, and for all claiming under any such person, to file a petition in any court in such county having chancery jurisdiction, praying for a decree establishing and confirming his said title.

Chapter 116, R. S. Ill., Starr & Curtis, pp. 1990 and 1996.

It was by stipulation between the parties (R., p. 12) that this relief was asked in connection with these proceedings. And that a Federal Court can administer such relief under the statute in question is evident from the case of *Smith* v. *Gage*, 11 Biss. 217.

A demurrer seems to have been sustained to this cross-bill on the 11th of April, 1877. (R., p. 24.) The sustaining of that demurrer was improper; and the failure to

grant the relief prayed for in this cross-bill is one of the errors we assign in this case.

It seems that the cause was submitted upon the cross-bill as well as upon the bill and answer. The deeds of the Slevins referred to in this cross-bill and in the answer of the Slevins (found pp. 50 to 56, inclusive, of the Record), were in evidence before the Master and before the court on final hearing. The recitals in those deeds were competent evidence of the foreclosure proceedings, the original decrees in which had been lost, as is set forth in the answer and in the cross-bill.

Miller v. *Shaw*, 103 Ill. 277, 285.

There is a total absence of any evidence to maintain the allegations of the complainant's bill, and a total failure to make out his title to the relief asked in the bill or amended bill.

"He who comes into equity to get rid of a legal title which is alleged to overshadow his own must show clearly the validity of his own title and the invalidity of his opponent's. He can not expect a court of equity to set aside a legal title upon a doubtful state of case."

Banks v. *Evans*, 10 Sm. & Marsh. 35, 62.

See also *Phelps* v. *Harris*, 51 Miss. 789.

It was alleged in the answer, as well as in the cross-bill, and not denied either by replication or by answer, that the Slevins had been in continuous possession of the lands in question ever since they entered under their deeds of July 21, 1863; and during all that time, for more than seven years, they had been continuously paying the taxes. (R., p. 7.)

In addition to this, it was alleged in the answer that besides the deeds from Barkley, Master, of the lands in question of July 21, 1863, the Slevins acquired a tax deed from the sheriff of Wayne county for the same lands in 1862. These allegations constituted a plea in bar of the statute of limitations, which, by Equity Rule XXXIX, we submit, may be alleged and insisted upon in an answer as well as by plea. If that be so, the bill of complaint should have been dismissed. For, even assuming that they had offered any proof to show that the Slevins' deeds of July 21, 1863, were void, or that Adams had, after 1875, any title whatever to the lands in question, still the matter of the plea in bar was not denied, or excepted to for insufficiency; and it was restated in the cross-bill under oath.

Furthermore (going outside of the pleadings), the bar of the Illinois statute was proved before the Master by evidence which was before the court on final hearing.

See deposition of Archibald Merrielees (R., p. 47), and the exhibits thereto (R., pp. 49 to 68, inclusive).

One section of the statute referred to is as follows:

"Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title."

Sec. 7, chap. 83, Starr & Curtis's Annotated Stat., Vol. 2, p. 1547.

Assuming the land in question to have been vacant land, then constructive possession (which is the only possession that the Slevins had during this period, according

to the testimony of Charles A. Beecher [see his deposition, R., pp. 70 to 72, inclusive]), would under this statute have placed the title in the Slevins, and the bill to remove cloud should have been dismissed. For it is denied by nobody that the taxes were duly paid upon these lands by the Slevins for much more than seven years, under deeds constituting color of title.

See *Newland* v. *Marsh*, 19 Ill. 376, where a tax deed was held to be color of title within this statute.

Also, *Thomas* v. *Eckard*, 88 Ill. 593, to the same point.

But it was held by the Master that the testimony showed that the Slevins had, since July 21, 1863, continuous *actual* possession. If that be so, then, by another section of the same statute, the concurrence of that actual possession with the color of title under the deeds, both the tax deed and the deeds of July 21, 1863, together with the continuous payment of taxes for seven years, created a complete title in the Slevins and a bar to the relief prayed for by the complainant in his bill, which, therefore, should have been dismissed.

This second provision of the Illinois statute is as follows:

"Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title."

Sec. 6, chap. 83, Starr & Curtis's Annot. Stat. Ill., p. 1539.

The Master, in his report (page 163 of the Record), states that the Slevins had reason to suppose, when they entered into possession of the lands under the Barkley deeds in 1863, that they entered as owners. So that it follows that even assuming that those deeds of 1863 to the Slevins had been by proof shown to be void (which they were not), still under this limitation section, the Slevins should have prevailed.

A decree of foreclosure which for any reason is insufficient to bar equity of redemption is, nevertheless, sufficient claim and color of title under this statute, where it is not procured by fraud or in bad faith.

Chickering v. *Fales*, 26 Ill. 507.

So a Master's deed under foreclosure proceedings, although the decree of foreclosure may be erroneous or even void, constitutes color of title under the limitation section last above quoted.

Mason v. *Ayers*, 73 Ill. 121.

In 18 Howard, this court, in passing upon the same section of the Illinois statute, have adopted the same view, saying on page 57:

"Statutes of limitation would be but of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world."

Wright v. *Mattison*, 18 How. 50, 57.

So far we have been considering the case made on the pleadings; that is, a bill to remove cloud or quiet title, an answer thereto; and a cross-bill to establish lost records

in connection with defendants' claim of title. We submit that the proceedings in the court below were erroneous upon this aspect of the case, both on final decree on the evidence (12th of March, 1886), and in the decree, December 31, 1879, which was on bill and answer. The bill of complainant should have been dismissed, and the Slevins should have had the relief prayed for in their cross-bill.

Departing now from the case made upon the pleadings to the case referred to the Master, tried before the Master and decided by the court upon the report of the Master, we submit that in that case, and in the decrees granting the relief therein, there was error.

First. The court erred in granting a relief, not only not prayed for in the bill, but not stated or disclosed in the bill.

Second. Yet, assuming that the court had the power to enter a decree for a relief and for a subject-matter not disclosed in the bill, we submit the court erred in finding that the Slevins ever entered into or held possession of these lands as mortgagees.

Third. Even assuming that we are wrong in both the foregoing positions, we claim that the court erred in its decree and the Master in his report in the method of stating the account against the Slevins, and in charging them with items of rent and waste which, upon the evidence, were not properly chargeable to them even as mortgagees in possession.

As to the first of these claims: The bill which the Slevins were called upon to answer was a bill to remove cloud or quiet title. That and nothing more. The bill is so entitled. The specific prayer for relief in both the bill and the amended bill is for a decree to remove cloud. As necessary to such a case, the bill charges that the lands

are in the possession of the complainant. The required allegations of a bill to remove cloud are possession and legal and equitable title in the complainant. Therefore, these are alleged by the complainant in his bill.

"Those only who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud upon the title."

Orton v. *Smith*, 18 How. 263, 265.

So in Illinois:

"There are only two cases, under our law, in which a party may file a bill to quiet title or to remove a cloud from the title to real property: First, when he is in possession of the lands; and second, when he claims to be the owner and the lands in controversy are unimproved and unoccupied."

Hardin v. *Jones*, 86 Ill. 313, 315.

It can not be seriously controverted that the only case presented by the complainants in their bill is to remove cloud; nothing further. This is the only equitable relief for which their bill contains the requisite allegations in the stating part of the bill. Either as heard upon the bill and answer or as heard upon the evidence, the record shows that the complainant failed—must necessarily have failed, to maintain his bill on this theory, and it should have been dismissed. For there was a failure to show that Adams had the necessary possession. According to the estimate by the Master of the evidence that was before him, the lands were not unimproved and unoccupied. So possession by the complainant was essential. Indeed, if it had been shown that the lands were unimproved and unoccupied, then by section 7 of chapter 83 of

the Revised Statutes of Illinois above quoted, the limitation of seven years' payment of taxes, with color of title under the tax deed which the Slevins had, would have perfected the Slevins title and barred the recovery of the complainant.

Furthermore, it would destroy the basis of the Master's calculation of rents against the Slevins.

The dilemma here presented to complainant confronts his case throughout.

We are not unmindful that it is in proof that Turney had possession of the lands for about two or three months in the year 1874. But, as the Master states in his report (R., p. 160), this possession had been forcibly taken by Turney. And so the proof shows. It can not be contended that forcible possession will avail the complainants as supplying the possession necessary to maintain the bill to remove cloud.

As is said in the case of *Hardin* v. *Jones*, 86 Ill., *supra*, on page 316:

"A party will not be permitted to take advantage of his own wrong, and where such party has obtained possession of lands in controversy fraudulently or forcibly, although in the actual possession, he will be treated in equity as out of possession so far as the jurisdiction of the court is concerned to hear and determine a bill to quiet title to the premises. His wrongful act can afford no foundation for equitable jurisdiction and relief."

It is not proved that Adams paid any thing to Turney for his deed to these lands. He does not appear, either upon the pleadings or by any proof, as other than a volunteer. That fact alone should deny him standing in a court of equity, as is said by the court in *Orton* v. *Smith*, 18 How., *supra*, at page 265:

"The complainant in this case is the volunteer purchaser of a litigous claim; he is the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration. This legal title was improperly assigned to him during the pendency of a suit in chancery to ascertain the person justly entitled to it."

But, assuming that the showing in this record discloses a right in complainants to maintain their bill to quiet title, that does not entitle them to other relief, the necessary facts for which are not expressly stated and charged, and the character of which relief is not indicated in the bill.

The prayer of a bill in chancery should ask the stated relief to which the complainant supposes himself entitled.

Nor does the prayer for general relief supply the defect where the matter necessary to the different relief is not charged in the answer. The prayers should be in the alternative if there are two distinct kinds of relief asked, and both sets of facts showing the right to each of the two kinds of equitable relief should be stated in the bill. Without amendment, it is error to enter a decree upon a bill thus defective in its allegations, although upon the proof the complainant's right to a different relief is made out.

"Now it is perfectly clear, that, according to the practice of the court, where a specific relief is asked for, although there be a prayer for general relief, the court can not grant a relief which is inconsitent with, or entirely different from that which is asked for. . . If the practice were otherwise, it would be not only unnecessary to state the relief which is desired, but it would be mischievous to do so, as it could only serve to deceive the other side."

Wilson v. *Graham*, 4 Wash. C. C. 53, 58.

The point is that the defendant to the bill must be apprised, not only by the facts charged in the bill, but by the specific prayer thereof, what the nature of the case is that he is called upon to meet, answer to, and procure his evidence for.

On a complainant's testimony at the hearing, showing a complete right to a different relief than that charged or prayed for in the bill, no decree for relief other than as prayed for in the bill can be entered without an amendment of the bill, which would give the defendant the opportunity to meet this changed case. The *probata* must correspond with the *allegata;* otherwise, the defendant would be taken by surprise, and be at a great disadvantage.

"The orator must allege in his bill those facts, upon which he claims title to relief. He can not recover upon a case different from that alleged."

Sanborn v. *Kittredge*, 20 Vt. 632.

In *Bushnell* v. *Avery*, 121 Mass. 148, the bill in equity charged that the plaintiffs were the assignees of the mortgagors of certain property of which they were in possession; that they had fully performed all the conditions of the mortgage, and were entitled to hold the property discharged therefrom; that the mortgagees had given notice of an intention to foreclose, and threatened to take possession of the property, by reason of which a cloud rested on their title; and prayed for an account. The bill was dismissed, Judge Devens saying, on page 149:

"Without discussing under what circumstances a bill to redeem personal property from a mortgage thereon may be maintained, no such condition of facts is set forth as entitles the plaintiffs to the relief prayed for. There is no averment that the plaintiffs are unable to determine upon the facts as stated by them and the true construction of the

contract by which they are bound, whether any thing is properly due from them to the defendants; nor any averment that the defendants have ever refused to render a full account of their demand. The case, as the plaintiffs present it, is that of a wholly unfounded claim to personal property, of which they are in possession. . . . In the prayer of their bill the plaintiffs pray that an account may be taken to show what sum is due from them; but there are no allegations in the stating part of the bill which show such facts as require that any such account should be ordered. . . . No such case appears by the stating part of the bill, which can not be enlarged by the terms of the prayer for relief."

Nor can any admissions or statements in the answer of defendants supply any such defect in the stating part of the bill so as to give the court the power to render a decree for a different relief from that expressly disclosed and sought in the bill.

"No admissions in an answer to a bill in chancery can, under any circumstances, lay the foundation for relief under any specific head of equity; unless it be substantially set forth in the bill."

Jackson v. *Ashton*, 11 Peters, 229.

The complainants in this case not only do not make the charge necessary to support a prayer for the redemption of a mortgage or for a decree against a mortgagee in possession, but they do not even ask for an account.

Harrison v. *Nixon*, 9 Peters, 483.

Mr. Justice Story, delivering the opinion of the court, says, bottom of page 501:

"The cause having come before this court for argument upon the merits, a question occurred whether the frame of the bill, taken by itself, or taken in connection

with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause and make a final decision. The bill contains no averments of the actual domicil of the testator at the time of the making of his will, or at the time of his death, or at any intermediate period. Nor does the answer contain any averments of domicil, which supply these defects in the bill, even if it could so do, as we are of opinion, in point of law, it could not. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff, so that the same may be put in issue by the answer and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court can not judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation. The *allegata* and *probata* must reciprocally meet to conform to each other."

Spriggs' Heirs v. *Albin's Heirs*, 6 J. J. Marshall, 158, 164.

The court below in that case had granted a decree of partition, whereas the bill had prayed only for specific execution of a contract. The court say on page 164:

"We consider it (that is, the view taken by the court below) untenable. It is not embraced by the bill or any supplement; and to indulge it without allegation, would be to tolerate a total departure from every avowed object of the pleadings. A specific execution of Spriggs's contract, or the confirmation of a title founded in presumption, are the objects of the bill. The idea of a partition of joint rights is nowhere held forth. When that subject is brought into litigation it may be that it will be shown that partition has already been made. In relation to this point, we think the parties were not bound under the pleadings to make any preparation, and might justly complain of surprise by making it the grounds for a decree."

The decree of the court was therefore reversed, and the cause remanded with directions to dismiss the bill.

The rule of chancery practice is not otherwise in Illinois.

Rowan v. *Bowles*, 21 Ill. 17.

The bill in this case alleged an exhaustion of personal assets as a ground for the sale of the lands of the intestate which was prayed. The proof showed a misapplication of the personal assets. The court say on page 19:

"In the bill it is distinctly alleged, as ground for subjecting the lands to the payment of the decree, that there were no personal assets in the hands of Rowan to be applied to satisfy it. . . . This is the whole case made by the complainants, and the only inquiry before the court, was the amount of the decree rendered in the suit for an account in 1853, and the existence of personal assets out of which to satisfy it. The production of the decree established the first, and upon inquiry into the other fact it was made to appear that the assets really applicable to this decree had been exhausted by Rowan in the payment of claims of an inferior class, to the extent of $935.21. But this is nowhere alleged in the bill—it comes out incidentally. It has been decided in several cases by this court that a complainant must recover on the case made by his bill, and he can not be permitted to state one case in the bill and make out a different one in proof. The allegations and proof must correspond, mutually supporting each other. Although a good case may appear in the evidence, yet if it is variant from the one stated in the bill, the bill will be dismissed.

"It is a settled principle in all cases that the allegations and proofs must correspond—that the latter must make out the former, and that a party will not be entitled to relief, although the evidence makes out a clear case in his favor, unless there are averments in the bill of the

shape made by the evidence. A party must stand or fall by the case made by his bill.

"Now, the case made by this bill is the exhaustion of the personal assets, the proof is that the administrator has misapplied $935.21 of those assets, and he is made individually responsible therefor. This would be all right if the complainant had so charged in his bill and had so prayed. . . .

"The decree is reversed and the cause remanded with leave to complainants to amend their bill."

Also, *McKay* v. *Bissett*, 5 Gilman (Ill.), 499.

This was a bill in chancery to correct a mistake, alleging actual notice to a subsequent purchaser. The real question at issue, therefore, was one of notice. Upon the trial below the bill had been dismissed, that fact being found against the complainant. Judge Treat (who, curiously enough, is the same Judge Samuel H. Treat who, long afterward, as federal judge, decided the case at bar), held as follows, on page 504:

"The question of notice is decisive of this case. The complainant alleges in the bill that the defendant, Tiffany, in whom the legal estate in the lot is vested, had actual notice of the mistake in the description of the lot in the conveyance to Bissett. This is made the basis of his right to relief as against this defendant. The charge of notice is explicitly denied in the answer. There is no proof whatever to sustain the allegation. It is insisted, however, by counsel for the complainant, that this defendant was not a purchaser for a valuable consideration, and therefore proof of actual notice is unnecessary. It is a conclusive answer to this position to say that the bill does not place the right of relief upon this ground. A complainant must recover on the case made by his bill. He is not permitted to state one case in the bill and make out a different one in proof. The allegations and proof must correspond. The latter

must support and not be inconsistent with the former. Although a good case may appear in the evidence, yet if it be variant from the one stated in the bill, the bill will be dismissed. The defendant has the right to answer and contest the case on which the complainant claims relief. If the complainant intended to rely on the fact that the defendant was not a purchaser for a valuable consideration, he should have distinctly so stated and charged in the bill. The defendant could then have shaped his case accordingly. As it was, he was not called upon to explain and controvert such an allegation."

So in the case at bar. The complainant exhibited to the defendant a bill charging possession by the complainant and asking for the removal of a deed as a cloud upon his title. The Slevins had the right to answer and contest that case; any other case, they were not called upon to meet.

When, however, the case came on for hearing on bill and answer, Turney and Adams shifted their ground and obtained from the court a decree that the possession of the lands was in the Slevins; and that such possession was as mortgagees, chargeable with the rents, profits and waste.

We submit, that if Adams intended to rely on the fact that the Slevins had possession of these lands and had entered into possession thereof as mortgagees, Turney and Adams should have distinctly so charged in the bill. As it was, the Slevins were not called on to explain or controvert any such allegation.

Rule XXI of the rules of practice in equity established by this court provides that the prayer of the bill shall ask the special relief to which the complainant supposes himself entitled. Conformity to this rule would

have indicated to the Slevins that the case they were to meet was not one for the removal of a cloud, but for the redemption of a mortgage and charging them (the Slevins) with entering into possession of the lands as mortgagees.

But suppose we are wrong in this, and that the court had the right to make a decree for relief not prayed for or suggested in the bill, and had the right to refer the case to a Master for an inquiry quite foreign to any thing shown in the bill, still, we submit, under our second claim, that the court erred in finding a decree that the Slevins ever entered into possession of these lands as mortgagees. There is no evidence in the record even tending to show that they entered as mortgagees. The finding that they are liable to account as mortgagees in possession, and the reference of the cause for such an inquiry and statement of account, is unsupported by testimony either before the court at the time the decree was entered, December 31, 1879, or subsequently, when the final decree was entered.

Charles A. Beecher (who was the agent of the Slevins in Wayne county, and who afterward became the general solicitor for the Ohio and Mississippi Railway Company) states in his deposition (R., pp. 70–72) when and how the Slevins entered into possession of these lands. He placed on record, on July 22, 1863, the deeds from Barkley, Special Master, to the Slevins, dated July 21, 1863. It was at that time, and not before; under these deeds, and not otherwise, that the Slevins obtained such possession as they had of these lands. This is not controverted by any witness.

Conflict, there is, among the witnesses as to the extent of the possession; as to whether or not the Slevins leased, fenced, or cultivated any or all of the property.

But what witness says that the Slevins actually entered into possession as mortgagees? None. What proof shows they did so even constructively as mortgagees? None. They entered in no other capacity than as owners under these deeds placed on record July 22, 1863. Mr. Beecher says that he thereafter proceeded to pay taxes for the Slevins on these lands every year. Every item of evidence on the subject of their entry into possession and the time and manner of it repels the idea of an entry as mortgagees.

We have already called attention to the fact that there was not only no proof, but no pleadings before the court justifying any such finding. The Slevins had not asked to be converted back into mortgagees; they had bought the property on a foreclosure sale, and after the statutory period had expired within which a right of redemption could be exercised by the former owner of the equity of redemption, they had taken deeds from Barkley and had placed these deeds on record.

These deeds may be found on page 50 to 56, inclusive, of the Record. They contain the recitals usual in such Master's deeds, of the foreclosure proceedings in detail. They recite the order of August term, 1860, under which the premises were re-advertised for sale; that on the 5th of April, 1862, Barkley, Master, made due publication of the notice of the sale; that Charles A. Beecher became the purchaser as the highest bidder; that the lands were struck off to him, and that the term of fifteen months having expired since the sale of said lands, and the same re-

maining unredeemed, and Charles A. Beecher having duly assigned his certificates of purchase to the Slevins, thereupon the Master proceeded to make formal conveyance of the premises, in fee-simple, to the Slevins. The deeds are duly acknowledged and duly recorded.

The reference in the Master's deeds to the failure to redeem (R., pp. 52 and 55) is to section 18, of chapter 77, Revised Statutes of Illinois, Starr & Curtis, page 1395, which is as follows:

"Any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under the defendant, may within twelve months from said sale redeem the said real estate so sold by paying to the purchaser thereof, his executors, administrators, or assigns, or to the sheriff or Master in chancery, or other officer who sold the same, or his successor in office, for the benefit of such purchaser, his executors, administrators, or assigns, the sum of money for which the premises were sold, or bid off, with interest thereon at the rate of eight per centum per annum from the time of such sale, whereupon such sale and certificate shall be null and void."

After the time for redemption provided in this section of the statute, the Slevins were entitled to, and got, a deed, clear not only of the equity of redemption, but of the statutory right of redemption which the statute adds to the equity.

Can these foreclosure proceedings, and the deeds thereunder, be attacked collaterally? We think not; certainly not for any error, informality, or irregularity that is shown in this record.

Sutterlin v. *Conn. Mut. Ins. Co.*, 90 Ill. 483.

Even if the pleadings or proof were before the court

sufficient for a decree for redemption, is not the complainant guilty of fatal laches?

The deeds were recorded July 21, 1863. This bill was filed (to remove cloud) October 17, 1874—eleven years.

A delay of ten years was held fatal in *Irish* v. *Antioch College*, 126 Ill. 474.

Purchases by mortgagees at foreclosure sales under powers, were frequently held void and inoperative against the mortgagor's equity of redemption, because of the trust capacity in which the mortgagee exercised such powers and made such sales, and the frequent abuse of the power, and oppression of the mortgagor, so that, in 1879, the legislature abolished such foreclosures, and compelled a chancery foreclosure, as in the case of mortgages containing no power of sale.

Pub. Laws of Illinois, 1879, p. 211.

"MORTGAGES.

POWERS OF SALE IN MORTGAGES AND TRUST DEEDS.

§ 1.—*Foreclosure.*

AN ACT in relation to mortgages and trust deeds. Approved May 7, 1879. In force, July 1, 1879.

SECTION 1. [FORECLOSURE.] *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That no real estate within this state, shall be sold by virtue of any power of sale, contained in any mortgage, trust deed, or other conveyance in the nature of a mortgage, executed after the taking effect of this act; but all such mortgages, trust deeds, or other conveyances in the nature of a mortgage, shall only be foreclosed, in the manner provided for foreclosing mortgages containing no power of sale; and no real estate shall be sold to satisfy any such mortgage, trust deed, or other conveyance in the nature of

a mortgage, except in pursuance of a judgment or decree of a court of competent jurisdiction.

Approved May 7, 1879."

"Such trusts have been the source of abuse and oppression to such an extent that the legislature, no doubt for that reason, was largely influenced in prohibiting sales under such powers, and has required them to be foreclosed in equity, that the rights of those making them may be protected. See Pub. Laws, 1879, p. 211."

Vent v. *Cobb*, 105 Ill. 33, 38, 39.

Adams takes only such rights as Turney had, and subject to any laches on his part. The foreclosure of a mortgage by sale under a power in the mortgage is regarded with less favor by a court of equity, than a foreclosure by bill in chancery, such as was had in the case at bar. But the court, in *Irish* v. *Antioch Coll.*, *supra*, the foreclosure sale in question having been *before* the act of May 7, 1879, say, p. 484:

"The rule is, that the owner of the equity of redemption should avail himself in apt time of irregularities in a sale under a power of sale in a mortgage or deed of trust, and that his failure to do so would constitute laches. It is not permissible for him to lie by and await events, and have the power, at any time in the future, to let the sale stand, or to avoid it, according as it may be found then to his interest to do. There should be promptitude of action within a reasonable time."

Nowhere has this phase of laches been more rigorously enforced than in the court which we now have the honor of addressing.

In *Badger* v. *Badger*, 2 Wall. 87, Mr. Justice Grier, at page 94 of his opinion, sums up the doctrine as follows:

"Long acquiescence and laches by parties out of pos-

session are productive of much hardship and injustice to others, and can not be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

Again, in *Hayward* v. *National Bank*, 96 U. S. 611, which was a bill to redeem collateral, the court say, on page 617:

"But the appellant is equally concluded by the lapse of time during which that transaction has been allowed to stand, without any effort upon his part to impeach it. It must now be regarded as unimpeachable.

"Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' . . .

"If Hayward was defrauded of his stock—if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally upon any ground to repudiate the sale and re-claim the stock,—it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and in the value of the stock had intervened. No sufficient reason is given for the delay ensuing. His

poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

Another case is *Harwood* v. *Railroad Co.*, 17 Wall. 78. This was a bill to set aside, as fraudulent, completed judicial proceedings regular on their face. The judgment of the court below dismissing the bill was affirmed; Mr. Justice Hunt, delivering the opinion of the court, saying, on page 81:

"We are of the opinion also that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears they have slept upon their knowledge for several years."

Richards v. *Mackall*, 124 U. S. 183, was a bill brought in April, 1882, for the purpose of setting aside a sale and conveyance in 1870, for insufficiencies and irregularities in those proceedings. The court below had set the sale and conveyance aside, and had decreed the appellee to be the owner of the property with the right to have the legal title conveyed to him upon his paying appellant's claim as judgment creditor as well as his disbursements in connection with the premises. On appeal to this court that decree was reversed, Mr. Justice Harlan saying on page 189:

"We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings, in due time, to have the sale set aside. He knew that the ap-

pellant relied upon the sale, and upon the faith of it expended large sums. . . . But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information, during the whole of that period, of every fact now relied upon by him, appellee asks the aid of a court of equity to set aside the sale and conveyance, and adjudge him to be the owner of the property. . . . In our judgment he is not in position to claim the interference of a court of equity. For that reason alone, the judgment must be reversed and the cause remanded with directions to dismiss the bill."

So in *Davidson* v. *Davis*, 125 U. S. 90, the second clause of the syllabus announces that

"The remedy by bill in equity to compel a specific performance of a contract to sell personal property upon the payment of a promissory note given by the other party, payable at a date after the making of the contract, is lost through the laches of the complainant, if he wait five years after the maturity of the note before filing his bill, and the property meanwhile greatly increases in value."

In the case of *Parker* v. *Daeres*, 130 U. S. 43, a decree dismissing a bill praying for the cancellation of certain sheriffs' deeds after the expiration of a period of nine years, was affirmed. Mr. Justice Harlan, in delivering the opinion of the court, saying, on page 49:

"We are of opinion that, construing the statute (a statute allowing redemption similar to that in Illinois), so as to give effect to the object for which it was enacted, a court of equity should refuse aid to a party, asserting under it a right of redemption, who has neglected, at least without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with

law. If, as suggested, this remedy is cumulative only, that fact only diminishes the right of the plaintiff to relief; for he not only neglected to avail himself of this specific remedy, but failed to invoke, in due time, the general authority of a court of equity. The interpretation we give to the statute is supported by the principle upon which courts of equity uniformly proceed, independently of any statute of limitations, of refusing relief to those who unreasonably delay to invoke their aid."

In the case cited from 126 Ill., as in the case at bar, during the interval between the sale and the filing of the bill, the property in question became largely enhanced in value, though originally but bare security for the debt.

Irish v. *Antioch Coll*, *supra*, p. 484.

The vice of the Master's report, and of the decree based upon it, seems to be a failure to properly appreciate, and give due importance to, the consideration of the character of the circumstances, situation, surroundings, and reasonable belief of the Slevins, at the time they entered into possession of the lands in question, as giving legal effect to the act of taking possession, and as establishing the status and capacity of their subsequent possession. For unless the court can find from all the circumstances surrounding the transaction, that at the time the Slevins took possession, they either knew, or were bound to know, that they were entering into possession in the character of trustees, and not in their own right unincumbered by any implied equitable duty to third persons, then, we submit, the court can not properly find that the Slevins entered into and held possession as mortgagees, or are chargeable as such.

The Master cites as law in support of his findings as

to the extent of the liability of the Slevins, the following authorities:

Mosier v. *Norton*, 83 Ill. 524.
Clark v. *Finlan*, 90 Ill. 247.
McConnell v. *Hullabush*, 11 Ill. 70.
Roberts v. *Fleming*, 53 Ill. 20.
Harper v. *Eli*, 70 Ill. 58.
Jones on Mortgages, § 1123.
Bigler v. *Waller*, 14 Wall. 297.

Mosier v. *Norton*, 83 Ill. 524, was a bill for the foreclosure of a mortgage. The bill alleged moneys paid for redemption of the land under a prior mortgage. The defendant answered admitting the mortgage and the payments of the redemption money, and claimed that the mortgagee had taken possession of the mortgaged premises on March, 1862, and had received rents since that time. There was no controversy in the case but that Mosier, mortgagee, *had* in fact entered into possession of the premises *as mortgagee*. He had entered into possession in 1862, and had not prior to that time, nor since down to the filing of the bill to foreclose, acquired any title, either by foreclosure or otherwise, to the property. Obviously, the only character that could be given to his possession was that of mortgagee. Otherwise than as mortgagee he had no shadow of right to take the premises, and as a mortgagee has that right after condition broken, or before, by agreement with the mortgagor. Mosier's entry was of course as mortgagee rather than as trespasser, for trespasser he was not, as he entered rightfully.

In *Clark* v. *Finlan* there was a deed from Finlan to Clark, absolute in form, but by the express or implied agreement between the parties at the time of its delivery, intended to be a mortgage. Upon that theory

it was, that the court considered the case one in which the possession of Finlan would be regarded as that of mortgagee; the understanding between the parties being that Clark was a mortgagee, and, therefore, a trustee; and when he took possession he did so with the knowledge that he would have to account to somebody for his management of the property. It was a mortgage in fact, that is, in equity, though not on its face. The only right that Clark had to enter upon the property, which gives character to his entry and possession, was that of the holder of the property as security for a debt; which carries with it the liability to account for the use made of the property.

McConnell v. *Hullabush* was a bill by McConnell to redeem from a mortgage executed by his grantor. It is expressly stated on page 69 that the rights of the defendants, as assignees of the mortgagee, to an interest in, or lien upon, this land, were derived from the defendant under the mortgage, and by virtue of those rights they maintained possession and received the rents and profits. There was no question made in the case but that the only character in which the defendants had entered into possession of the lands in question was that of the original mortgagees. The entry was under the mortgage, and as holding the land as security for the debt.

Roberts v. *Fleming* was a case where a trustee under a mortgage containing a power of sale, had purchased at his own sale. This was held to so invalidate the purchase as that the rights of the mortgagor remained precisely the same as though no sale had been made.

Harper v. *Ely* was a case of the same kind, where a mortgagee who had taken possession under a deed of trust with a power of sale, had on default, sold the premises, purchasing it himself; and that sale being, for the same

reason as stated in *Roberts* v. *Fleming*, void, his character as mortgagee remained. Possession had been taken under the mortgage deed containing the power of sale.

The reference to Jones on Mortgages is simply a statement of the rule that applies to mortgagees in possession, and begs the question of the character in which the possession was taken.

Bigler v. *Waller* was also a case of a sale under a deed of trust with a power, declared void because mortgagee purchased at his own sale. The right of entry was given by the deed itself.

These cases above cited all concede or assume the character in which the party took possession to be that of mortgagee.

In the case at bar, we deny that the Slevins took possession as mortgagees; and unless they did, and if they took possession in any other character, they can not be chargeable as trustees.

The Slevins mortgage contained no power of sale and no express right of entry.

See the comments above, pp. 38, 39, on distinction between foreclosures by bill in chancery and sales under powers.

Parkinson v. *Hanbury*, L. R., 2 Eng. & Irish Appeals, p. 1.

Parkinson mortgaged certain premises to Chambers by a deed containing power of sale on three months' notice. Thereafter the premises were transferred to Hanbury & Co. as security for a debt. This constituted a second mortgage upon the property. Thereafter Parkinson became embarrassed in business, and for a valuable consideration turned over the possession of the premises to Han-

bury & Co., who were to act as his agents to collect the rents, etc. Thereafter the executors of Chambers, the first mortgagee, under a power of sale contained in his mortgage, sold the property to Hanbury & Co.; but the sale being without the three months' notice required, it was afterward declared to be invalid. Hanbury & Co., however, had received, after the execution of the deed from the executors of Chambers, certain rents received from the premises in question. Thereafter, a bill was brought by the administratrix of Parkinson against Hanbury & Co. for an accounting of the rents received from the premises, whom she treated as mortgagees in possession. But the House of Lords held that they were not chargeable as mortgagees in possession; the Lord Chancellor saying, on page 8:

"It is very clear that in the peculiar case of a mortgagee who chooses to assert his rights by taking possession of the mortgaged estate, and who is not bound to render any account to the mortgagor, if the mortgagor sues for a redemption of the property, the mortgagee who has so taken possession is bound to account, not only for the rents and profits which he has received, but also for every thing which he might have received but for his own willful default. That, I believe, is the only instance in which a person in possession of an estate who is called upon to account, is made answerable for that which he might have received but for his wilful default."

And further on, at page 9, coming to consider the effect upon the liability of Hanbury & Co. by reason of the invalidity of the sale to them under which they had taken possession, the Lord Chancellor says:

"Now, that sale having been held to be invalid, it is contended on the part of the appellant that these rents having been received without any right under the memorandum of agency, or any right under the purchase from

Chambers, that, therefore the only title which the defendants can pretend to for the receipt of these rents must be in their character of mortgagees. . . . It may be, my Lords, that they were not entitled to receive those rents at all, that is putting it in the most unfavorable way for the defendants. . . . But it is perfectly clear that they never assumed to receive those rents as mortgagees, and therefore, if it is only where a mortgagee asserts his strong right by entering into possession and receiving the rents and profits, that, when he is called on to account, he has to account not only for what he has received, but also for that which he might have received but for his own wilful default; that principle can not certainly apply to this case. My Lords, it appears to me to be impossible to put the case in the way in which it was ingeniously put by *Mr. Darby*, that the sale by *Chambers's* executors having been decreed to be invalid, there was no other title on which the defendants could possibly be in possession except that of being mortgagees, and that, therefore, retrospectively, it must be considered that their possession must be applied to that title as mortgagees, and to no other. I apprehend that it is perfectly clear that that can not be maintained."

And, again, Lord Cranworth, in delivering his opinion, on page 13, says:

"Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the *Royal Oak* public house ought to have been directed charging the defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the respondents with being in receipt as mortgagees upon two grounds. That which was insisted upon mainly was this, that their title, which they acquired under *Chambers*, on the 9th of October, 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of *Chambers*, and *Chambers* was merely a mortgagee. I think that it is perfectly clear law that when a

person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterward turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases; but it seems to me to depend upon this: that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule."

And Lord Westerbury, in delivering his opinion, on pages 15 and 16, says:

"It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a court of equity as the bailiff of the mortgagor. . . . But if that ground is referred to as the foundation of the practice, it must of necessity follow, that the party receiving receives in the character to which that relation of bailiff and principal may be properly imputed; and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents, as the bailiff of the mortgagor, or that that relation could properly be imputed to him."

We have not been able to find a case where the reason of the rule has been better stated than in the foregoing opinion of the House of Lords. Nor have we been able to find a case where persons, who, like the Slevins, purchased at a foreclosure sale (not under a defectively executed power of sale, as in the two cases in Illinois, and the

case in 14 Wallace, above mentioned, but under foreclosure proceedings in equity, such as are set forth in this record), and after the expiration of the statutory period for redemption, take a deed for the premises, have been held as mortgagees in possession, where the fact was uncontroverted that they in fact made no entry upon, and in fact took no possession of, the mortgaged premises as mortgagees; but entered supposing they had, and having a right to suppose they had, a valid title as purchasers.

The Master finds that the evidence shows that the Slevins had

"reason to suppose when they entered upon possession of the lands under the Barkley deed, in 1863, that they entered as owners and not as mortgagees." (R., p. 163.)

Coming now to the third and last proposition, and assuming that the Slevins' possession was not under their deeds, but under the mortgages, we submit that they are not chargeable with the timber that was carried off, for inquiry into that was not warranted by the reference to the Master. The only matters of waste he was directed to inquire into (see R., p, 29) were those of removal of fences and buildings. Upon this point the Master finds (R., p. 165) as follows:

"It is obvious that the loss of the timber was largely a consequence of the neglect to fence, or to maintain fences. The responsibility of the loss of the timber rests, therefore, fairly upon the defendants in the original bill" (the Slevins).

This is an astounding statement; for, if we understand it, it is that a fence around a tract of sixty or seventy acres of woodland will prevent the timber from being

stolen. We should be inclined to think that a man who will cut and steal a piece of timber, will certainly see to getting it through or over a fence; and we can not see what significance the question of the fence has.

It is G. J. George's negligence in leaving the fences down so the trees could get away that is here charged to the Slevins, as George was the agent of the Slevins. But it does not appear by the evidence that George was in fact negligent about this timber, for Harvey T. Stewart, one of complainants' witnesses, testifies (R., p. 45) as follows:

"G. J. George told me to let no one take timber off the land."

Nor are the Slevins chargeable (even upon the above assumption) with rents or profits that might, by prudent management, have been derived from the lands. Even upon the best showing that can be claimed for the complainants, the liability of the Slevins as in possession under their mortgage can not hold them to any stricter account than that of the grantee of an absolute deed which is by a court of equity afterward held to be a mortgage. In such cases courts have distinguished between the strict liability of the mortgagee who knowingly enters into possession, realizing that his entry is in the capacity of mortgagee, and the case of such a grantee of a deed subsequently declared to be that of a mortgage. The courts have in this way clearly emphasized the importance of the belief of the party entering into possession.

The Slevins, on the facts in this case, had much stronger reason to believe their title to be as absolute owners, than the equitable mortgagee above mentioned.

Barnard v. *Jenison*, 27 Mich. 230.

It was a bill to redeem from a deed given by way of

security, and for an accounting as to the amount due. The defendants had been in possession, receiving the rents. The opinion is by Judge Cooley, who says on page 231:

"The conveyance of the Barnard House property to the defendants, though by deed absolute in form, was unquestionably by way of security merely, and the complainants were entitled to redeem. But the allowance to complainants for the rent of the premises while held by defendants appears to us on the evidence to be excessive. We do not think the defendants were exactly in the position of ordinary mortgagees who take possession by way of enforcing their security."

Morris v. *Budlong*, 78 N. Y. 543.

This was a case of a deed absolute on its face, but shown to be intended as security for a loan, and therefore, in equity, a mortgage. The bill was for the cancellation of the mortgage and for an account. The court say, page 555:

"That the farm was not worked to its fullest capacity, furnishes no ground under the circumstances of this case for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the willful default of Budlong in this respect could be found; nor has it been. He is not, in any sense a wrong-doer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris, and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions; of which the one chosen is in direct contradiction of the written instruments which display his title;

and he is therefore chargeable only with what he has received, and not with what he might have received."

[The opinion then cites with approval the case of *Parkinson* v. *Hanbury*, from the English and Irish Appeals, *supra*.]

We contend that, even as against mortgagees who have taken possession (and *a fortiori*, as against those who have entered in a capacity inconsistent with the character of mortgagees, and in the honest belief that the equity of redemption had been cut off, and that they were absolute owners), the rule is, that unless there has been a wilful default by such mortgagees, or such gross negligence as is equivalent to fraud, in failing to obtain rent from the premises, they can not be charged beyond his actual receipts.

1 Vernon, 45: "A mortgagee shall not account according to the value of the land, viz: He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so had it not been for his willful default; as if he turned out a tenant that held it for so much rent, or refused to accept a sufficient tenant that would have given so much for it."

Even if a mortgagee should turn out a sufficient tenant, that act might charge him with the loss of the specific rent which would have been obtained from that tenant for the time and premises so lost and vacated. It could not create a liability to pay on the rest of the property or the balance of the time, as to which there had been no such wilful cause of loss.

See also *Parkinson* v. *Hanbury*, *supra*.

In this connection, and as bearing upon the exorbitant

method of charging the Slevins adopted by the Master, we call attention to the fact that the Slevins were residents of Ohio during all this time; they managed the property from a distance through agents. It was not improved property, save in a technical sense, by reason of having been, to some extent, fenced. They therefore, may be said to have bestowed upon it that attention which a non-resident owner would bestow upon like property similarly situated.

Turney, however, lived near to these lands, at least from 1869 down to the date of the decree, December 31, 1879; and he knew, and the Slevins did not know, whether the property could be better managed, better fenced, or better cultivated than it was.

The letter that the Slevins wrote to their agent, George, dated February 19, 1877 (R., pp. 73, 74), shows the Slevins giving such heed to the welfare of the property as an owner would, under the circumstances. They did not choose to make an improvident lease, or a lease on those terms. They made a counter offer to Holmes, as it appears by the letter; yet, the refusal to take Holmes' first proposition to put up fence in lieu of rent for a term of three years, is seized upon by the Master as sufficient proof that the Slevins could have got an exorbitant rental for every acre of the land that was not timberland, during every month of the entire sixteen years.

I am now calling attention to the fact that it was complainant, and not the Slevins, who were near these lands and knew their condition and their possibilities.

See *Mosier* v. *Norton*, 100 Ills. 63.

This is one of the cases cited by the master, as reported in 83 Ills. 532. It came a second time to the Supreme Court of Illinois, who say (p. 68):

"The court below erred in decreeing that complainant should account for the reasonable rental value of the lands. This was a departure from the rule prescribed by this court when the cause was here before. . . . Of course he would be answerable for any gross neglect which might result in loss to the mortgagor, whose premises he holds. Any more stringent rule than this, it seems to us, would be unjust and unreasonable."

There is no evidence in this case sufficient to charge the Slevins with gross negligence in the management of this property. The complete answer to such a charge is that the Slevins believed, and had a right to believe, that from the 21st of April, 1863, they were the owners of it, and as owners they employed agents to look after it; agents, whom the testimony shows were men of standing and character in the community; agents near the property. Regarding it as their own, they did that which it was the part of a prudent non-resident owner or manager of the property to do, viz: to pay the taxes, remove squatters, and dispose of the land by sale as opportunity offered.

Further on, in *Mosier* v. *Norton*, 100 Ill., *supra*, the court say, on page 70:

"Complainant lived in another county, twenty-five miles distant from the premises, and he seems to have trusted to the honesty of his tenant to deliver, and of the receivers of the grain to send him, his share of the crops. In the affairs of life, trust is, and must be, reposed in our fellow-men. . . . Further, the defendant Norton, lived at Galva, only five miles from the land, and the nearest railroad station where the grain was delivered. He was concerned in the matter, and should have taken interest in it, and had opportunity to know how the farm was run and managed, and what amount of rent was being received. If there was any thing wrong, or any cause of dissatisfaction in any respect, negligence is rather chargeable

on him in not making communication thereof to complainant. A similar circumstance is adverted to in *Hughes* v. *Williams*, 12 Vesey, 493, cited in full on page 949*b*, 3 Powell on Mortgages, as showing the duty which the mortgagor owes the mortgagee, in this regard, where the question was, whether the mortgagee should be charged with the rents actually received, or a greater rent, which it was claimed he ought to have obtained. Lord Erskine, in delivering judgment, said: 'Another circumstance was that the mortgagor, if he knew that the estate was underlet, ought to have given notice to the mortgagee, and to have afforded his advice and aid for the purpose of making the estate as productive as possible. In this instance, not only such notice was not given, but during the whole period of sixteen years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be.' These are observations which are pertinent to the present case."

So they are pertinent to the case at bar, and so the Supreme Court of Massachusetts considered them in the case of *Gerrish* v. *Black*, 104 Mass. 400.

The Master in that case (as appears by the opinion on page 404) had taken as the standard, such care and diligence in leasing the mortgaged premises and collecting the rents as a provident owner in charge of the property would exercise, and then had estimated what the several tenements ought to have rented for during the several years of the defendant's possession, deducting in some instances a certain percentage for the time during which, through the scarcity of tenants, the premises, with reasonable care and diligence on the part of the lessor, would have been vacant, through lack of tenants.

The court, on page 405, after considering the amount of the rents reported by the Master as chargeable to the mortgagee, say:

"In reaching this, the Master, as against the actual results of the defendants' management, seems to have given too much importance to the testimony of the plaintiff's witnesses, who were called as experts to fix, with reference to the several tenements, the rent which in their opinion ought to have been received during the several years which had passed. . . .

"Where the mortgagee enters only into the receipt of rent from tenants who hold under him, and, from the *fact that he resides at a distance*, must rely upon agents to manage the estate, and where there is a lack of other proof to show want of due care and diligence, it seems to us that such estimates ought not to control. In the same paragraph in which Chancellor Kent defines the duty of a mortgagee in possession to be that of a provident owner, he also says he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they were reduced or lost by his willful default or gross negligence. 4 Kent Com. (6th ed.) 166.

"And it is said a mortgagee will not be obliged to account according to the value of the lands; he will not be bound by any proof that the land was worth so much, unless it can likewise be proved that he actually made that sum of it, or might have made it had he not been guilty of fraud or wilful deceit, as, if he turned out a sufficient tenant, etc. For it is the laches of the mortgagor that he lets the land lapse into the hands of the mortgagee by the non-payment of the money. . . .

"In the case at bar, it must have been contemplated by the original parties to the mortgage, that, in case of the plaintiff's default, the mortgagee, who lived in Maine, in taking possession of the estate would be obliged to rely upon the management of agents. (The premises were in Massachusetts.) The executor and present defendant also resides in Maine. . . . There is no charge of bad faith; and there seems to have been no temptation to manage the estate, so far as rents were concerned, other than for the best interest of all concerned. Upon the whole, we are

of opinion that the mortgagee was held by the Master to too strict liability for rents beyond those actually received, and the case is re-committed to him for revision in this respect."

It will be noticed that the Master, in that case, made allowances for loss of rent from scarcity of tenants.

In the case at bar there is no proof that for all the sixteen years from July 21, 1863, to December 31, 1879, an unbroken series of unfailing tenants were to be had for any, still less for every, acre of the two hundred and seventy acres of this property. No witness testified that in Wayne county, Illinois, between 1863 and 1879, there were no bad years, when property of this kind could not be rented, or if rented that full rentals could always be collected. There was no testimony that this property, during these sixteen years, was exempt from such losses in rental as are incident to all property—inevitable to rough tracts of land like this.

The testimony is, that it was mostly prairie. Deposition of Charles A. Beecher, R. pp. 70 and 72; Thomas L. Cooper, R. p. 75; G. R. George, R. p. 80; John H. Nichols, R. p. 93; Alexander Richardson, R. p. 95; William Whittaker, R. p. 99; L. J. Rider, R. p. 101; E. S. Black, R. p. 104; John Rankin, R. p. 108; James H. Nichols, R. p. 111.

Nichols says, and he is corroborated by others, that these lands were not only not under fence, but they were "out on the commons."

In the case of *New Orleans* v. *Gaines*, 131 U. S. 191, this court used language which applies here. The court was, by its judgment, reducing the magnitude of a Master's findings for items charged as "value for use." Mr. Justice Bradley, in delivering the opinion, on page 217, says:

"There are hundreds of acres in the vicinity of Wash-

ington, for example, lying open and in common. A German gardener may purchase a small lot, and by his industry make it produce a large revenue; and another might erect a saloon and get a reasonable custom. But it would be impossible to convert the entire suburbs, consisting, perhaps, of more than a thousand acres, into market gardens or beer saloons, or to build cottages or rows of houses on them to any advantage. The small examples are exceptions. Large outlying tracts have to abide the natural growth and spread of the city. They may lie unproductive in the hands of the most provident man for years."

We do not care here to sift the testimony, which is conflicting, as to whether the property was fenced or not, or how much; but we do insist that it is shown, beyond controversy, that much of this property lay out on the commons, and through it ran a county road. Beecher's testimony (R. p. 72):

"The people traveled over it, and had about as much possession of it as Slevin. I mean by that, it lay out in the commons, and one of the principal roads of Fairfield is over this property."

This is not disputed. And yet, for every acre of the two hundred and seventy acres not covered with brush or timber, the Master charged the Slevins with a net rental of three hundred and fifty dollars, for sixteen years. That is to say, it is a rental in addition to the taxes and other expenditures on the lands that the Slevins paid during the same period.

No allowance for bad years; no allowance for default of tenants; all the well known incidents of property, diminishing its rental in some years, wiping out its income in others, are ignored; but visionary, constructive rent is heaped up against the Slevins with a recklessly liberal hand, as if to punish the Slevins for some actual wrong committed.

Consider the situation. Adams had borrowed from the Slevins; he had defaulted repayment for nine years; the mortgages were then duly foreclosed; sales made on foreclosure. The statutory period for redemption elapsed, and deeds were made to the Slevins and placed on record. This was in 1863. By the recording of these deeds, if not otherwise, notice was brought home to Turney, who lived near by, that the Slevins claimed to be the owners of these lands. Then, for over sixteen years, Turney stood by, knowing, or fairly assumed to know, the actual condition of the premises, whether rented or not, and for how much; whether fenced or unfenced; whether subject to loss of timber by thieves or not, and how much.

Does his attitude before the court in this case, entitle him to favor? Should a premium be placed upon such laches and delinquency as here exhibited by complainant?

For what owner of mortgaged property would promptly pay his debt, if laches and default are to be rewarded as lavishly as in these proceedings below?

If Turney had not mortgaged his property, or if, having mortgaged it, he had paid his mortgage off in 1863 and taken possession, it will not be pretended that he would have received for every year down to December 31, 1879, three hundred and fifty dollars per annum in excess of taxes, costs and repairs. No Wayne county farmer ever found such a bonanza in his prairie, as Mr. Wilson constructed for Turney out of those sixteen years of net theoretical rents.

Taking Turney's and Adams's own statement in their amended bill as fixing the value of this property at $10 per acre in 1875, this rental of $350 on two hundred and seventy acres is equivalent to thirteen per cent net per annum. Rather an attractive investment.

So that the result is, by the decree below in this case, that Turney has, by continuing in default, and by adding one delay to another, succeeded in accomplishing a success in the rental of his property which no actual experience could have paralleled; and out of these fabulous rentals he has had accomplished for him the payment of his entire mortgage debt and interest on it, together with taxes on his property, and all charges for repairs upon it; has had repaid to him the shrinkage in the value of fences from natural decay; has got a large sum in payment for timber that was stolen from the woodland by thieves, for whose thefts, if he had been in actual ownership himself, he would have been remediless; besides all this, he has got back a lot of prairie land that has recently increased in value, and a balance of $77.58 against the mortgagee.

So that, upon the whole, to be a delinquent mortgagor in Illinois—and the more persistently delinquent the better—is a not unenviable position, if in the neighborhood of a liberal Master in Chancery and a court inattentive, at times, to the law.

Even if this court should consider that the Slevins took possession as mortgagees, we do not believe the Slevins can on this record be held chargeable upon any such harsh theory as that laid down by the decree and the Master's report below.

It is so excessive as to be, from the standpoint of the Slevins, in the nature of an unjust penalty inflicted for no offense. From the standpoint of Mr. Turney, it operates as a new, but, we submit, erroneous, way to pay old debts.

The surprising results reached by the court below are due:

1. To ignoring the pleadings.
2. To misapprehension of the testimony.
3. To forgetfulness of the law.

Appellant asks that the proceedings and decree of the court below be reversed and the cause remanded, with instructions that the bill of complainants be dismissed.

JOSEPH WILBY,
For Appellant.

KITTREDGE & WILBY,
Of Counsel.

CINCINNATI, *January* 13, 1890.

FILED
JAN 25 1890
JAMES H. MCKENNEY
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. 243.

AUGUST TRUM, TRUSTEE OF J. & J. SLEVIN,
Appellants.

VS.

LEANDER J. S. TURNEY AND ROBLEY D. ADAMS
Appellees.

Appeal from the Circuit Court of the United States,
Southern District of Illinois.

STATEMENT OF THE CASE AND BRIEF OF JOHN M. PALMER FOR APPELLANTS.

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Appeal from the Circuit Court of the United States, Southern District of Illinois.

STATEMENT OF THE CASE AND BRIEF OF JOHN M. PALMER FOR APPELLANTS.

On the 24th of October, 1874, Leander J. S. Turney exhibited his bill in equity in the Circuit Court of Wayne county, in the State of Illinois, against John Slevin and James Slevin, in which he claimed title in fee simple to the east half of section No. thirty-six, township No. one, south range seven, east of the first principal meridian, lying in Wayne county, Illinois, except the southwest quarter of the southeast quarter of said section, and claimed by like title the northwest quarter of the northwest quarter of section No. six, in township No. two, south

range seven, west of the first principal meridian, in the same county.

He alleges in the bill that he was then in possession of the lands described, "and that John Slevin and James Slevin, citizens of the State of Ohio, pretend to be the owners of said land under a decree of foreclosure rendered in Clinton county, Illinois. That said possession and title is void in law and equity, and is a cloud on the title of said complainant."

Upon the allegations quoted above, the bill prayed "that said pretended deed so held by the said defendant be set aside and cancelled, and the title of the complainant be quieted."

On the 14th day of August, 1876, a paper was filed in the office of the clerk of the Circuit Court of Wayne county, which is called "An Amended Bill."

Leander J. S. Turney and Robley D. Adams are the complainants in this bill. They allege that Turney was the owner of the lands described in the original bill except the tract last mentioned in the bill, and is described as being in range eight south.

The bill alleges that Turney, on the 15th day of April, 1874, was the owner of the lands before described in fee simple, and on that day conveyed them to Adams, his co-complainant, who was in possession of the same.

The lands were alleged to be of the value of ten dollars per acre, an aggregate value of $3,600.

It was then charged that on the 22d day of July, 1863, the

defendants, James L. Slevin and John Slevin, placed upon the records of Wayne county a deed purporting to be made by Joseph G. Barkley, Special Commissioner appointed by a decree of the Circuit Court of Clinton county, of the August term, 1860.

It was then charged that in the deed made by Turney to Adams, he warranted that said lands were free from all incumbrance; that there was no such decree of the Clinton Circuit Court authorizing Barkley to convey Turney's title to the land to James L. and John Slevin, and that the deed of Barkley to them was a cloud upon Adams' lawful and equitable title.

It further alleged that Thomas E. Slevin, who succeeded to the rights of James Slevin, who is deceased, and that he, with John J. Slevin and August Trum, have an interest in the lands by virtue of an assignment of John Slevin's interest.

The persons named are made defendants to the bill, and a decree prayed that the deed from Barkley to the Slevin's be declared to be a cloud upon Adam's title and cancelled.

On the 26th of October, 1876, John Slevin and Thomas E. Slevin, John F. Slevin, August Trum and Anthony Shouter, filed their answer to the complainants' bill.

In the answer they say, that on the 1st day of January, 1853, L. J. S. Turney was the owner in fee simple of the lands in said bill contained, but that on the 21st day of November, 1853, he executed to J. and J. Slevin a mortgage deed to the said lands for the sum of $2,000, which mortgage was duly recorded in the recorder's office of Wayne county; that after-

wards, on the 10th day of December, 1857, said lands were sold by Joseph G. Barkley, Master in Chancery of Wayne county, by virtue of a decree of foreclosure, had in the Clinton County Circuit Court, rendered at the May Term, 1856, at which sale Charles A. Beecher became the purchaser of said lands, and to whom a certificate of purchase was issued, upon which certificate, on the 21st day of July, 1863, a deed was executed to J. and J. Slevin, as the assignees of said Beecher, which deed was made by Barkley, Master in Chancery of Wayne county, and is recorded in book P., on page 330.

They further answer that they claim title under a foreclosure and a certain mortgage executed on the 6th day of September, 1851, by Turney and Charles A. Eldridge, and also under the foreclosure of a certain other mortgage executed July 30th, 1853, by said Turney to Edwin Beecher, both of which mortgages were included in the said bill described, and were foreclosed at the same time, and that J. and J. Slevin, their grantees and heirs and legal representatives, have been in continuous possession of said lands under said deed for more than seven years, since July 21st, 1863.

They further answer that on the 10th day of June, 1862, the Sheriff of Wayne county, Illinois, executed a deed to the lands mentioned in complainants' bill on the certificate of purchase held by said John Slevin, for the taxes, interests and costs on said lands, due thereon for the year 1859, which deed is recorded in book N, on page 342. Defendants deny that their deeds are a cloud upon the title of the complainants, but that in truth and in fact, they, the defendants, are the legal and

equitable owners of the land, and that they have been and are now in the constructive possession of the same, and have paid all the taxes assessed thereon since the year 1859. They deny that complainant, Turney, was the owner of the lands up to April 15th, 1885, and they further deny that Adams has the custody or is in possession of the land, but that in truth and in fact Adams took a deed to said lands with full knowledge of the rights of the defendants, and in the face of their undisputed and open possession, and that he paid no consideration for the lands.

At the October term, 1876, an application was made by the complainants, Turney and Adams, to transfer the cause from the Wayne County Circuit Court to the Circuit Court of the United States for the Southern District of Illinois. This application was allowed and the cause transferred accordingly.

John Slevin, Thomas E. Slevin, James S. Slevin and John F. Slevin, August Trum and Anthony Shouter, Trustees of J. & J. Slevin & Co., filed their cross-bill in the cause to the Circuit Court of the United States for the Southern District of Illinois, to the January term, 1877.

The cross-bill alleges that, on the 6th day of September, 1851, Turney and his wife made, executed and delivered, to Charles W. Eldridge, their deed of mortgage upon the east half of section thirty-six (36), in township one (1) south of range seven (7) east, situated in Wayne county, Illinois, to secure the payment of a certain promissory note executed on the 6th day of September, by Turney to the said Charles W. Eldridge, for

the sum of $900.00, with interest thereon from the date of said note, which note was taken for the purchase money of said lands; which mortgage was duly recorded in Wayne county; that afterwards, on the 6th day of November, 1856, Eldridge filed in the Circuit Court of said county, his bill in chancery to foreclose said mortgage to pay the aforesaid note, making Turney and wife and others respondents; that Turney and wife were served with process; that at the April term, 1856, the said Circuit Court of Wayne county, upon application of Turney, venue in said cause was changed to the Circuit Court of Clinton county; that afterwards, at the May term, 1856, of said Court Clinton county, Turney answered the bill of complainants, in which answer it was alleged, among other things, that Turney, on the 30th day of July, 1853, mortgaged the east half of section thirty-six (36), township one (1) south, rage seven (7) east, to one Edwin Beecher, and that said east half of section thirty-six (36) was, on the 2d day of November, 1853, mortgaged by the said Turney to John and James Slevin, which answer was filed on the 25th of May, 1856.

The proceedings of a decree purporting to have been rendered by the Circuit Court of Clinton county, at the May term, 1856, in that cause, is set out at length in the record, together with the proceedings under which the lands in question were subsequently sold by the special master, Joseph G. Barkley. It is then alleged that on the 30th day of July, 1853, Turney made, executed and delivered to Edwin Beecher, a deed of mortgage upon the east half of section thirty-six (36) and other property, to secure the payment of a promissory note executed

on the 30th day of July, 1856, by the said Turney to said Beecher, for the sum of $337.00, payable on or before the first day of March, 1854, with interest at the rate of ten per cent per annum; that afterwards, on the 27th day of November, 1855, Beecher, for the use of James Slevin, now deceased, and John Slevin, filed in the Circuit Court of the county of Wayne, his bill in chancery to foreclose said mortgage, and to sell the said real estate therein mentioned, to pay the aforesaid note; the venue of that cause, it is alleged, was changed to Clinton county. The proceedings in Clinton county are then briefly set forth, and it is alleged that the cause was referred to the master in Clinton county, who found due to the complainants $367.64.

It is then alleged that a decree was rendered for the sale of the property for the satisfaction of said amount, and a memorandum of the decree taken from the records is set out; it alleged then the sale of the property by Barkley, master in chancery of Wayne county, by virtue of a decree of the said court of Clinton county, and that Charles A. Beecher purchased the premises and received a certificate of purchase therefor.

The cross-bill sets out proceedings in a cause of James and John Slevin, in the circuit court of Wayne county, a change of venue in that cause to Clinton county. Proceedings to a decree in which it is said the sum of $2,060, was found due to the complainants on the mortgage. It then alleges a sale of the property for the satisfaction of this mortgage on the 10th day of January, 1857, at which Charles A. Beecher became the purchaser, assigning his certificate of purchase to James and John

Slevin, and that upon these certificates of purchase the master in chancery afterwards executed deeds to the assignee of the purchaser.

The bill then proceeds to state other facts that are thought to be immaterial, among other things, that the Slevins were declared bankrupt by the District Court of the southern District of Ohio, and John F. Slevin, August Trum and Anthony Shouter were appointed trustees of J. J. Slevin & Co.; and that J. & J. Slevin conveyed the property in controversy to their trustees before named.

The cross-bill further alleges that the complainants have had possession of the mortgaged premises ever since they acquired title thereto, and are now entitled to possession; that at the time Turney filed his bill, to remove the cloud upon his title, he had no title whatever to the premises; that his deed to Adams, who has filed his amended bill in connection with said Turney, alleged and well knew that Turney, his grantee, had no title whatever to said mortgaged premi-es, that he was receiving no title thereby, and only intended to put his deed from Turner on record, and thereby cloud the title of the complainants, with a view to extract money from them, and compel them to buy the fraudulent, trumped-up title, for which Adams had paid no consideration whatever. They allege that the decrees in the above three causes in Clinton county, have been lost, stolen or destroyed, and were never recorded among the records of Clinton and Wayne counties, as they should have been, and that upon search in both the counties they were not found. The bill prays then process against Turney and Adams, requir-

ing them to answer the bill without oath, and asks general relief.

The default of the defendants was taken from the cross-bill, and the cause was referred to a master; subsequently, the default and reference were set aside, the defendants demurred to the cross-bill, and the demurrer was sustained and leave given to the complaints to amend; and then amendment to cross-bill was filed to the June term of court, 1879. On the 31st day of December, 1889, the parties appeared and the case was heard upon the complaint's bill and answer of the defendants; and the cross-bill filed herein, and the court found that Robley D. Adams was then the lawful and equitable owner of the land subject to the encumbrances heretofore mentioned

The court further found that the deed made by Barkley under the supposed decree of the Clinton County Circuit Court was without lawful authority, and were, therefore, null and void, and was a cloud upon the title of the complainant, Adams.

It was further decreed that John Slevin and James Slevin, their heirs and assigns, be restored to all their legal and equitable rights, under their mortgages, of said land executed to them; and pay also the mortgages to Beecher and Eldridge, by Turney and wife, except such portion of the real estate as should have been paid by John and James Slevin before the rendering of this decree.

It is further ordered that John and James Slevin, their heirs and assigns, in addition to their rights under their said

mortgages, be allowed all taxes and interest thereon in the State and Federal courts, paid by them, assumed to be a lien on said lands, and that their said amount due on said mortgages, and taxes and interest paid by said defendants on said lands, shall be deducted; all rents and profits derived from said land, and by said John Slevin and James Slevin, or those holding under them having such deeds as them, or those holding them, having been in possess on of said land, or any other party thereon, and all valuable improvements removed from said premises or destroyed by those in possession of said premises under and by the authority of said respondents, John and James Slevin, or their agents by their like authority, since they first took possession of the same, and for all moneys received by the respondents, James and John Slevin, as payment on the notes secured by said mortgage, all sums said respondents may have, either by themselves or their attorneys or agents, received on said notes or personal property under any judgment or judgments or decrees, against the said Leander J. S. Turney upon said notes; also all moneys received by said respondents, by reason of a sale made of any other lands exclusive of the said northwest fourth of section six (6), township twelve (12), range eight (8) east, and the east half of section thirty-six (36), township one (1), range seven (7), was, by the payment of said note, either at public or private sale, to any person or persons whomsoever, all said sums so secured by said respondents, either by themselves or agents or attorneys, shall be entered and placed as a credit on said sums so secured by said mortgage and a judgment for that received.

It was further ordered, adjudged and decreed by the court, that the said respondents, and all parties holding by, through or under them, who have purchased any of the said lands since the filing of the original bill in this cause, surrender the possession of said lands, to-wit: the east half of section thirty-six (36), township one (1), south of range seven (7) east, except the southwest quarter of the southeast quarter of section thirty-six (36), township one (1) south range seven (7) east, heretofore sold Oliver Holmes.

And said respondents, John and James Slevin, and their heirs, and all persons holding for them, shall also surrender possession of the northwest quarter of section six (6) township two (2), south of range eight (8) east, in Wayne county, Illinois, to Robley D. Adams, whenever they shall be notified by said Adams so to do; and also surrender with it a certified copy of said decree.

It is also ordered that this cause be referred to John A. Jones, Master in Chancery of this court, to make a report of evidence in this cause according to the foregoing decree. The report of the master was filed September 16th, 1880. He reported that on the 18th of May, 1880, he took the testimony in writing of Archibald Nissieleer, a witness on behalf of said defendants, whih testimony is made part of this report, and marked Ex. No. "I," and that Adams, the complaint, objected to the same. His objection is noted on the margin. He further reported that on May 31st, 1880, he took the deposition of Richard W. Boggs, William W.; George and Adam Rinard, Oliver Holmes and Ezra T. Hall, and Gilbert George, witnesses

on behalf of complaints, which depositions are made part of his report, and marked Ex. "2." On the 27th day of December, 1884, the cause was, by the consent of the parties, referred to Bluford Wilson, one of the Masters in Chancery of the court, with directions to ascertain:

First—The amount of principal and interest now due on the three mortgages made by Leander J. S. Turney on the lands in question.

Second—The amount of taxes paid on the mortgaged premises by the defendants in the original and the complainants in the cross-bill.

Third—The amount that the defendants in the original bill, and the complaints in the cross-bill, have received from the sale of any of the lands in question.

Fourth—Whether the defendants in the original bill, and the complainants in the cross-bill, have ever had actual possession of the lands in question, and if so how much they have received from the rents and profits of the same, or how much in rents and profits might have been received therefrom by reasonable care and prudence.

Fifth—The amount in full of any waste in the removal of fences and buildings, that the defendants in the original bill and the complaints in the cross-bill have committed on the lands in question.

Sixth—In making these inquiries the master may consider any evidence already taken in the cause; he may also hear and

consider any further evidence that may be offered by either parties on reasonable notice.

Seventh—The master will report to the court all such further evidence, and also his conclusions on all the foregoing questions.

The master examined a number of witnessess, whose testimony will be referred to hereafter.

On the 18th day of May, 1885, the master filed in the office of the clerk his report in said cause. After referring the cause to him, he says, that prior to the above date, the 27th day of December, 1884, the court, by its decree of the 31st day of December, 1879, had settled the title of the lands in controversy, and prescribed the basis of an accounting and settlement between the parties, the only question, he says, left to be determined, is for the amount, if any, due the defendants in the original bill, and the three mortgages made by Leander J. S. Turney; he adds that he had found it difficult, but not impossible, to reach an exact determination of the question, and was obliged to be content with such approximate conclusions as to some of the items in controversy as he was unable to treat, after the most attentive consideration, and the law cited by the counsel applicable thereto. He reported that there is due to the defendants in the original bill and the complainants in the cross bill.

First—On the mortgage from Turney to Eldridge upon the east half of the southeast quarter of section thirty-six (36) township one (1), south range seven (7) east, $900.00 principal, with

interest at six per cent. from September 6, 1851, and on the mortgage from Turney to Beecher upon the same half section and due on lot No. 7, $337.00 principal, with interest at ten per cent. from July 30, 1853, and on the mortgage from Turney to the Slevins upon the same half section and the northwest quarter of the northwest quarter of section six (6), township twelve (12) south, range eight (8) east, $2,000 principal, with interest at six per cent. from November 21, 1855, that being the date of maturity; that the defendants have paid taxes on the mortgaged premises as follows. (See printed record, page 154.) He then proceeds to state the amount of taxes for twenty-one years, amounting to $1,649.61, with interest from the date of payment. He then refers to the decree, which provides that the defendant in the original bill and the complainants in the cross-bill shall be allowed, in addition to the taxes and interest thereon, all costs with interest incurred by them in the State and Federal Courts; he reports the amount paid by them on the account of these items $404.06, upon which interest is to be allowed from the dates of payments. He then finds that the defendants in the original bill and the complainants in the cross-bill had received an aggregate of $2,800 from the sales of lands described in the bill. (See printed record, page 155.)

He proceeds to state that both parties in their pleadings claimed to have been in the possession of the mortgaged premises pending and prior to this litigation; that Turney, by his bill filed in the Wayne County Circuit Court, October 14, 1874, claimed that he was then in possession of said lands; that Turney and Adams, by their amended bill, filed August 14, 1876,

alleged that Adams was the owner in fee simple, and was in the custody and possession of the same land; that neither of these bills were sworn to; that in the answers filed by the Slevins on the 12th of October, 1876, they claimed title to the lands under certain certificates of purchase, and further claim that they had been in continuous possession of said lands and paid taxes under said deed for more than seven years since July 21, 1863. Again, in the same answer, they allege that they were then in the constructive possession of the same lands and had paid the taxes on the same since 1859. In the same answer they deny that Adams was in the possession of the lands, but took a deed for the lands with the full knowledge of their rights and in the face of their undisputed and open possession.

In their crosss-bill, filed March 2, 1877, they claim to have been in possession of the lands under a deed from Barkley, Master in Chancery, since the 21st day of July, 1863.

He reports further that a demurrer to the cross-bill is among the papers that Adams never filed but was marked by them, and since by counsel assumed to be a part of the record; it is an admission by the defendants in the cross-bill to the fact that possession was alleged and claimed by the complainants therein. As matter of strict practice, no proof would be required to established a fact thus admitted in the pleading; nor would either party be permitted to contradict any proof of the abundance of the fact made in their respective bills, but as each party claimed possession of the whole it is obvious that both cannot be right, and as the question will be found to be

one of very great moment in the settlement of the account between the parties by becoming important to settle it if possible under the evidence upon its merits. In claiming possession he says both parties clearly meant actual possession, *pedis possessio*, as well as constructive possession. It appears then that the Master proceeded to examine witnesses upon the question of possession. In detail he reports the testimony of the witnesses, and refers to the record of the court made in the cause on the 31st day of December, 1879 (see printed record page 160), and treats that decree as a concession by the counsel of Slevins of the question of possession. He proceeds; If it was the decree of the court it was clearly significant and conclusive; if any contingency in view of the decree is now seemed to have been consistent with the evidence, and in its requirements as to an accounting between the parties and as to the items thereof; it is in accordance not only with the facts but of equity and precedence. Even if the land had been wholly uninclosed from the first, the timber therefrom for fuel, fences and other purposes, and which was abundance of evidence and was so done with the knowlegde or within the easy means of knowledge of the Slevins or agents, would have been sufficient to establish in law actual possession. "I find, therefore, as to possession, that the defendant in the original bill, and the complainants in the cross-bill had actual possession of the mortgaged premises from July 21st, 1863, to the 31st day of December, 1879, with the exception of two or three months in the year 1874, during which Turney had forcible possession of the same." He finds that during the period referred to the complainants in the cross-bill were to be as mortgagees in possession, and were to be

charged with the rents and profits to the extent of what they should have received, or could by the exercise of reasonable diligence. He then proceeds to state the account of rents received (page 161 printed record). The master says, in his report, that Wooten and Gash seemed to have occupied a portion of the premises from 1864 to 1866, and Rider continuously from 1869 to 1879, and Stewart Nally and Sloan from 1874 to 1876, and so covered pretty much the whole period from 1863 to 1879. He finds the rents actually received by the defendants during that period were insignificant, and no well directed effort seems ever to have been made by them to keep the lands under fence and in rentable condition. Witnesses, the agents for the Slevins, deny that they had any authority to do so, and the Slevens themselves seem to have paid no attention whatever to render the lands productive and to keep them in rentable condition by maintaining and repairing the fences; they appear to have relied entirely upon the sales of the lands for the cancellation of their debt; and after the fences had entirely disappeared from the lands, except from the Rider tract, they rejected an offer in writing from a responsible party to rent for three years the entire premises, and place a good plank fence upon the same in lieu of rental for three years; this would have cost for the rail fence about $1,050, and was equivalent to an offer of at least $350 a year. This seems to him to have been a fatal error and a gross failure in the exercise of that reasonable care and prudence which the law demanded at their hands; he adds (printed record, 163), that Rider and others testified to the same effect, and agreed in the statement

that the lands were reasonably worth in rental value two dollars per acre annually, and if under fence that it could have been rented at that figure; if the lands were under fence when the Slevins took possession in 1863, it was their duty to have maintained them; if they were not under fences, or partially so, it was their duty to have repaired the fences, or to have accepted some such offer as that by Holmes; not to have done so was to render themselves liable not only for waste but the consequent rents or rentals which may otherwise have been reasonably secured. He finds that there were seventy acres of the land that was timber, and two hundred and seventy acres subject to rent, and he charges the defendants with $350.00 per annum; rents from July 21st, 1863, to the 21st day of April, 1873, and after that, at the same rate per acre on the lands held by them down to December 31st, 1879, and charged them in the account with interest computed annually (page 164 printed record). The Master assumes in his report that the Slevins took possession of the land in 1863, and refers to the testimony of witnesses to the effect that the premises were under fence at that time, and refers to the testimony of Mr. Beecher, who states that they were originally very poor, and were all hauled away by parties other than the Slevens soon after the above date. He assumes that it was the duty of the Slevins to have protected the property, to have repaired the fences if poor, and to have replaced them at the cost of the estate when worn out, and concludes that their neglect to do so was clearly waste. He refers to the fact that there was, at different periods in the history of the property, three buildings thereon capable of being used by ten-

ants. One of those buildings was erected by Turney, but as to the other buildings he was not able to fix the responsibility of their ruin. He says, on page 165 of the printed record, there is great controversy and conflict in the testimony over the timber. About seventy acres was in white oak, post oak, and grub; there was also some fair timber on the northeast tract and near the division line near G. J. George's land, and the land in controversy. There was originally about five acres near the line of the railroad which seemed to have been stripped about the time of the construction of the road in 1872. The evidence is conclusive, that from those dates to 1886, a number of saw logs was cut and hauled off the premises; also a quantity of cord-wood, rails and stakes; he refers to the evidence that the cutting off was by George's direction and to the testimony of the witnesses which he thinks reliable that as many as two hundred logs and three thousand rails were taken from the land under George's direction from 1874 to 1876; that the logs were sold to Miller, Sailor and Gaddis, and that the rails went into the division fence between George's land and this in controversy, and then states an account, the same as made by Merrilles and Holmes, which is substantially a confirmation of the above evidence. He refers again to the testimony of George, who, he says, denies that he ever authorized anybody to cut logs or rails off the Slevin land, or that he ever paid anybody for so doing, or that he ever received anything for the sale of the same, but the weight of testimony is against him. Besides, the taking was either with his knowledge or within the easy means of his knowledge and might have been

readily prevented. It is also obvious that the loss of the timber was largely a consequence of the neglecting of the fence or of maintaining the fence. The responsibility for the loss of the timber rests fairly upon the defendants in the original bill, and that it was never of great value, yet from his approximation it would have had an annual increasing value. The buildings, fence and timber comprise all the items of alleged waste, and from the evidence I find that defendants in the original and the complainants in the cross-bill have committed waste on the lands in question in respect to fence and timber and should be charged as follows: For buildings removed, two hundred and fifty dollars; for the fence permitted to be hauled away, one-third the value of a new one, three hundred and fifty dollars; for timber cut and removed, two hundred and ten dollars—in all the sum of eight hundred and ten dollars. He then concludes that the taxes and repairs be treated as cancelled annually by the annual rent charge allowed in addition to the three hundred and fifty dollars. The principal of the three mortgages is three thousand two hundred and thirty-seven dollars, of which three hundred and thirty-seven dollars bears ten per cent. and the balance, two thousand nine hundred, at six per cent. per annum interest should be computed to the 21st day of July, 1864. Any costs and interest thereon should be added to the interest account, and from the sum of interest should then be deducted one year's rent of three hundred and fifty dollars. The annual interest account from July, 1864, to April 23, 1872, would be two hundred and seven dollars and seventy cents. and the yearly difference between that sum and

the annual rent would be one hundred and forty-two dollars and thirty cents. The rent per acre would be three dollars and fifty cents. I have deducted at this rate from the amount of the annual rent after the sale to Holmes and Rider respectively on the above basis and present the following summary: Due defendants July 21, 1864, after the end of the first year of their possesion. (Printed record p. 166.)

On account of the Eldridge mortgage, principal	$900 00
On account of the Beecher mortgage, principal.....	337 00
On account of the Turney mortgage, principal.....	2,000 00
Principal.....	$3,237 00
On account of the Eldridge mortgage, interest at 6 per cent. twelve years, ten months and 15 days.....	$695 50
On account of Beecher mortgage, interest ten per cent. ten years, eleven months and twenty-one days,..	369 85
On account of Turney mortgage, interest at six per cent. eight years and eight months.....	1,040 00
Interest due July 21, 1861.....	$2,105 35
Due August, paid December 31, 1862, $89.61, and $8.79 int. at six per ct. to July 21, 1863.....,	98 40
Due August, paid May 25, 1864, 251.40, and 2.33 cents interest at six per cent. July 21, 1863.....	253 73
Total due defendants July 21, 1864, principal, $3,237, and interest and costs.....	2,457 48
Deducting one year's rent.....	350 00
Balance principal, $3,237, and interest.....	$2,107 48
Add one year's interest to July 31st, 1865, $33.70, and the $173.00.....	207 70
Add cost December 21st, 1864, $63.05 and $2.41 interest to July 21st, 1865.....	65 46
Total due to defendants July 21st, 1863, principal $3,237, interest and cost $2,380.64, making an aggregate of.....	$5,617 64

April 23d, 1872, deduct Holmes' payment for 40 acres	$1,600 00	
Also amount of annual difference between rent, $350.00 and $207.30, interest $142.30, for six years nine months and two days	961 30	
Total		2,561 30
Balance due defendants April 23d, 1872		3,056 34
November 11th, 1873, add interest one year six months and eighteen days at ten per cent. on $337.00		52 23
Add interest one year six months and eighteen days at six per cent. on $2,719.34		251 89
Aggregate		$3,360 46
November 11, 1873, deduct Barkley payment	$400 00	
Also rent charged at $311.12 per annum for one year, six months and eighteen days	481 48	
Aggregate		881 48
Balance due defendants November 11, 1873		$2,478 98
August 13, 1879, add interest for five years, nine months and twelve days at ten per cent. on $337.00, (add interest for five years, nine months and twelve days, at six per cent. on $2,141.98)		925 56
Aggregate		$3,404 54
August 13, 1879, deduct Rider payment for forty acres	$800 00	
Also rent charged at $311.12 for five years, nine months and two days, making a total of	1,790 65	
(Page 167 printed record)		$2,590 65
Balance due defendants August 13th, 1879		813 89
December 31, 1879, add interest for four months and eighteen days at ten per cent. on the $337.80		12 91
Add interest for four months and eighteen days at six per cent., $476.89		10 97
Balance due defendants December 31st, 1879		$837 77

December 31st, 1879, deduct amounnt of rent charged at $274.24 per annum for four months and eighteen days	$105	35
Also waste account	810	00
	$915	35
Balance due the complainants in the original bill December 31st, 1879	$77	58

The master further adds, that by the terms of the decree of December 31st, 1879, the complainants were to pay all the costs in the United States Court, and they do not seek in their bill to recover any balance found due on account stated, and therefore, respecting the report that it should be decreed that the debt due the defendants in the orignal bill and the complainants in the cross-bill under the several mortgages herein mentione d has been fully paid including interest, taxes and costs; that the title to the lands in controversy, except the sales confirmed by the decree of December 31st, 1879, be declared to be in said complainant in the original bill, Robley E. Adams, and that he pay the costs and fees under this reference, and in this court. On the 26th day of June, defendants filed exceptions to the master's report.

Exceptions taken by John Slevin and others, defendants in the original bill herein filed, to the report of Bluford Wilson, Esq., the Master in Chancery, to which (whom) this cause stands referred, by the interlocutory order made herein on the 27th day of December, 1884, and which report bears date May 18th, 1885. (401)

First Exception.—For that the said master, in and by said

report, found and reported to the court that these exceptants were in the actual possession of the lands in the pleadings in this cause described at some time or times, when it appears from the evidence that these exceptants were never at any time in the actual occupancy or possession of said lands.

Second Exception.—For that the said master, in and by said report, finds and reports to the court that these exceptants are liable for and chargeable with large sums of money for the rents and profits of the lands in the pleadings described, which they might have received by the exercise of reasonable care and prudence.

Third Exception.—For that the said master, in and by the said report, has found and reported to the court that these exceptants are liable for and chargeable for the natural decay of the improvements on said lands, and the cutting and removal of timber upon and from the lands aforesaid as waste committed by these exceptants. (402).

Fourth Exception.—For that the said master has found and reported to the court, in and by his said report, that there is a balance due to the complainant in the original bill, the sum of seventy-seven dollars and fifty-eight cents.

Fifth Exception.—For that the said master, in and by his said report, has erroneously computed interest upon sums of money reported by him to have been received by these exceptants on account of rents of the lands in the pleadings described.

Sixth Exception.—For that the findings and conclusions of

the said master in the said report contained are unwarranted by the evidence in the cause.

Seventh Exception.—For that the conclusions and findings of the said master in the said report contained are unwarranted and are beyond the scope of the interlocutory order herein referring the said cause to him. (403.)

Wherefore the said defendants in the original bill herein, and the complainants in the said cross bill, do except to the said report of the said Master in Chancery, and appeal therefrom to the judgment of this Honorable Court.

And afterwards, to-wit, on the 12th day of March, at the January Term of court, 1886, the following further proceedings were had in said court, in said cause and entered of record, to-wit:

And now, on this 12th day of March, A. D. 1886, again come said parties, by their solicitors, and Bluford Wilson, one of their masters in chancery of this court, to whom this cause was referred by an order entered on the 27th day of December, 1884, having submitted his report and findings herein, and the Court being now fully advised in the premises, doth overrule the exceptions to the report of the master and find, in accordance with the finding of the said master, that the mortgage executed by Leander J. S. Turney and Elizabeth Turney, his wife to Charles W. Eldridge on the 6th day of September, A. D. 1851, and recorded on the same date, in Deed Record "E", on page 122 of the Record Books of Wayne county, Illinois, to secure one promissory note of same date for the sum of $900.00,

due January 1st. A. D. 1856, on the east half of section thirty-six, in town one south, of range seven east, in Wayne county, Illinois, and that the mortgage executed by Leander J. S. Turney to Edwin Beecher on the 30th day of July, A. D. 1853, and recorded on the same date in Deed Record "F", at page 434, to secure one promissory note of that date for the sum of $337 00, due on the 1st day of March, A. D. 1854, with ten per cent interest from date, on the east half of section thirty-six, town one south, of range seven east, in Wayne county, Illinois, and on out-lot number seven (&), in Turney's Second Addition to Fairfield, Illinois, were both sold, transferred and assigned to John and James Slevin in the year A. D. 1860, who then became the lawful and equitable owners of the same. (405)

And the court doth further find, that on the 21st day of November, A. D. 1853, said Leander J. S. Turney executed and delivered to John and James Slevin a mortgage on the east half of section thirty-six, town one south, of range seven east, and the northwest quarter of section six, town two south, of range eight east, in Wayne county, Illinois, which mortgage was recorded on the 21st day of November, A. D. 1853, in book "A" of mortgages, page 5, of the Records of said Wayne county, Illinois, to secure one promissory note of the sum of $2,000, of even date of said mortgage. (406).

And the court doth further find that there was due to said John and James Slevin, on all of said notes and mortgages, and the interest thereon, and costs and tax paid by them on the 21st day of July, A. D. 1864, the sum of five thousand six hundred and seventeen dollars and sixty-four cents ($5,617.64).

And the court doth further find from the evidence in this cause, and from the findings and report of the master herein that on the 21st day of July, A. D. 1863, the said John Slevin and James Slevin, as mortgagees, took possession of the east half of section thirty-six, town one south, of range seven east, and the northwest quarter of the northwest quarter of section six, town two south, of range eight east, in Wayne county, Illinois, and remained in possession of the same by themselves and their tenants and those holding under them, as mortgagees in possession, until the 31st day of December, A. D. 1879, and that said lands were all under fence and susceptible of cultivation at the time of taking possession of the same, and that the rents and profits derived from said lands, and that might have been derived from said lands by prudent management of the same, amount to the sum of two dollars per acre per annum, or one dollar and fifty cents per acre per annum, over and above taxes and necessary repairs to keep and preserve the estate.

And the court doth further find, from the evidence in this cause and the report of the master filed herein, that waste was committed on said lands while the same was in possession of said John and James Slevin and their tenants and those holding under them by the removal and destruction of buildings standing on said lands while they had possession of the same, and by the removal of the fencing from around said lands, and by the sale and destruction of the timber on said lands, to the amount in the aggregate of eight hundred and ten dollars ($810.00).

And the court doth further find that the said John and James Slevin have received from Oliver Holmes, on the 23d day of April, A. D. 1872, the sum of sixteen hundred dollars ($1,600.00) for the sale of the southwest fourth of the south-east quarter of section thirty-six, township one south, range seven east, being a part of said lands; and on the 11th day of November, A. D. 1873, said John and James Slevin, the mortgagees, received from David W. Barkley the sum of four hundred dollars ($400.00) for sale of said out-lot number seven in Fairfield, being a part of said mortgaged premises; and on the 13th day of August, A. D. 1879, said Slevins and their trustees received from Lewis J. Rider the sum of eight hundred dollars ($800.00) for sale of the northwest fourth of the northwest quarter of section six, township two south, of range eight east, being a part of said mortgaged premises; all of which said sums should also be a credit on the said notes above described due from Leander J. S. Turney to said John and James Slevin and the mortgage given to secure the same.

And the court doth further find, from the evidence in this cause and from the report of the Master filed herein, that the amount received, or that might have been received by prudent management of said estate while in possession of the same, by said John and James Slevin, for rents derived from said lands while they and those holding under them had possession of the same, and from the wastes committed on the said lands while so in possession of said John and James Slevin and those holding under them, and from amounts of money received from Oliver Holmes and from David W. Barkley and from Lewis J. Rider,

for sale of portions of said mortgaged premises, amount in the aggregate to seventy-seven dollars and fifty-eight cents (77.58) more than the amount due said John Slevin and James Slevin on all of their said notes and mortgages above described, to-wit: The mortgage executed by Leander J. S. Turney and Elizabeth Turney, his wife, to Charles W. Eldridge, on the east half of section thirty-six, town one south, range seven east, and recorded in book "E" of Deeds, page 122, of Wayne county, Illinois, to secure one note of $900.00, and the mortgage executed to Edwin Beecher, on the east half of section thirty-six, town. one south, range seven east, and outlet number seven, in Turney's Second Addition to Fairfield, Illinois, and recorded in Deed Book "F" at page 434, of Wayne county, Illinois, and the mortgage executed by Leander J. S. Turney to John Slevin and James Slevin, on the 21st day of November, A. D. 1853, on the east half of section thirty-six, town. one south, range seven east, and the northwest quarter of the northwest quarter of section six, town. two south, range eight east, and recorded in Mortgage Book A, at page 5 of the mortgage reeords of Wayne county, Illinois, and also all interest on said notes secured by said mortgages, and all tax paid by John Slevin and James Slevin while they had possession of the same, and all costs and charges paid by said John Slevin and James Slevin, in and about said lands, and all amounts expended in any way in preserving said estate while so in their charge and custody and possession and control.

And the court doth therefore adjudge and decree that the title to the said northeast quarter and the north half of the

southeast quarter, and the southeast quarter of the southeast quarter, all in section thirty-six, town. one south, range seven east, except the southwest quarter of the southeast quarter of section thirty-six, town. one south, range seven east, heretofore sold to Oliver Holmes, is in said complainant, Robley D. Adams, free and clear of any and all liens or incumbrances of any kind or nature, by virtue of any of said mortgages above described, executed by said Leander J. S. Turney, which said mortgages are hereby decreed to be fully paid off, discharged and satisfied.

And it is further decreed that said Robley D. Adams pay all costs (except solicitor's fees) occasioned by this proceeding.

First.—The court erred in overruling the exceptions taken by John Slevin and others, defendants in the original bill, and who were complainants in the cross-bill.

Second.—From this decree August Trum, the trustee, prosecuted his appeal to this court, and assigns for error that the court erred in rendering a decree for the complainants in the original bill and against the defendants.

BRIEF OF JOHN M. PALMER FOR APPELLANT.

First.—The pleadings allege and the evidence shows that the parties called in the master's report the Slevins were in equity the creditors of L. J. S. Turney, and held three mortgages upon the lands in controversy.

Second.—The first of these mortgages was made by Turney and wife to Eldridge upon the east half of section 36, township 1 south, range 7 east, for $900 principal, with interest at six per cent. from September 6, 1851.

On the mortgage from Turney to Beecher upon the same half section and out-lot No. 7, in the town of Fairfield, for the sum of $337 principal, with interest at ten per cent. from July 30, 1853.

Third.—On the mortgage from Turney to the Slevins upon the same half section and the northwest quarter of the northwest quarter of section 6, township 2 south, range 8 east, for $2,000 principal, with interest at six per cent. from November 21, 1855.

Fourth.—The evidence shows that the defendants paid taxes on the mortgaged premises from and including the year 1858 to and including the taxes of 1884, amounting in the aggregate to $1,649.61, making a final aggregate due to the Slevins of $4,886.61, which, including the interest, was a lien upon the lands in controversy.

It is also established by the pleadings and the evidence that the Slevins, the defendants, had received from the proceeds of

the sales of the mortgaged premises an aggregate of $2,800. This would leave due to the defendants, the Slevins, and their representatives, the sum of $2,086.61, exclusive of interest.

This general statement of the accounts between the parties is presented as preliminary to the discussion of the points of controversy arising upon this record.

Leander J. S. Turney and Robley D. Adams, who will hereafter be referred to as the "complainants," adopted the original bill exhibited which was by Turney alone in the Wayne County Circuit Court on the 17th day of October, 1874, by an amended bill filed in the same court onu Agust 14, 1876.

In neither of these pleadings is any allusion whatever made to the liens then existing upon all the lands in favor of John and James Slevin.

The amended bill asserts no more than that Turney was the owner in fee of the lands, and had conveyed them to his co-complainant, Robley D. Adams, who was at the time the owner of the lands in fee-simple, and was then in possession of the same. The sole object of the amended bill was to obtain relief against a deed, which the bill alleges was, on the 22d day of July, 1863, placed upon the record books of Wayne county, Illinois, by James L. Slevin and John Slevin, which deed purported to convey all the lands in question, and was made by Joseph G Barkley, Special Commissioner, appointed by a decree of the Circuit Court of Clinton county, Illinois, at the August term thereof, in 1860.

It is charged that Barkley had no authority as commissioner to execute the deed; that it is void and a cloud upon Adams' title.

The bill then prays a decree that the deed may be declared void.

The amended bill alleged the death of John Slevin, and made James Slevin, John Slevin, Thomas Slevin, John J. Slevin, August Trum and Anthony Shouter, defendants (there is at this point some confusion in the record as to names of parties, that requires no explanation at present.)

The interests of the Slevins and their representatives are for the first time brought to the attention of the court, by the answer to the bill in the name of John Slevin, Thomas E. Slevin, John F Slevin, August Trum and Anthony *Shouter*, filed in the Wayne County Circuit Court, on Oct. 12th, 1876.

In the answers it is claimed by the defendants, in brief, that L. J. S. Turney, the fee-simple owner of the land described, on November 21st, 1853, executed a mortgage to J. and J. Slevin to secure the sum of $2,000.

There are allegations in the answer which are intended to set up a decree of foreclosure in the Circuit Court of Clinton county, state of Illinois, at the May term of 1856, and a sale of the lands in satisfaction of the decree, and a purchase by Beecher and an assignment of the certificate of the purchase, and a deed to the assignees, J. and J. Slevin.

The answer also disclosed the existence of the mortgage made on September 6, 1851, by Turney and wife to Charles A.

Eldridge, and the mortgage before mentioned, made by Turney to Edwin Beecher.

It is claimed that these mortgages were included in the foreclosure proceedings in Clinton county.

The answer denies that Adams was in possession of the lands, and claims that the defendants are now in the *constructive* possession of the same, and have paid all taxes assessed thereon since 1859, and charges upon Adams full knowledge of their right.

The cause was then transferred to the Circuit Court of the U. S. upon petition of the complainants, upon the ground of the non-residence of the defendants. John Slevin, Thomas E. Slevin, James S. Slevin and John F. Slevin, August Trum and Anthony Shouter, trustees of J. & J. Slevin & Co., on the 2d of March, 1877, filed their cross-bill in the Circuit Court of the U. S., for the Southern District of Illinois.

In this bill they refer to and recite at length the proceedings in Wayne and Clinton counties for the foreclosure of the mortgages before mentioned, a decree of foreclosure and sale, and a deed in pursuance of the sale and other matters that are not material to the question now involved in controversy, but they claim possession of the mortgaged premises under that deed, and charge that the alleged deed from Turney to Adams is fraudulent and void.

The cause was heard on December 31, 1879, upon the original and cross-bills. The court decreed the deed made by Joseph G. Barkley, Master in Chancery of Wayne County, to John

Slevin and James Slevin to be void, and adjudged Adams to be the lawful owner of the real estate under his deed from Turney, and that John Slevin and James Slevin, and their heirs and assigns and legal representatives, be restored to all their legal and equitable rights under their mortgage.

And the court further decreed, that in addition to their rights under their mortgages they were entitled to reimbursement for all taxes paid on said mortgaged premises and the interest thereon, as well as for all costs in the Federal and State Courts with interest, the same to be a lien on said land.

The court further directed that from the amount due defendants there should be deducted all rents and profits derived from said lands by John and James Slevin and those holding under them, for such times as they, or those holding under them had been in possession of said lands, or any part thereof, and all valuable improvements removed from said premises, or destroyed by those in possession of said premises, under or by the authority of said respondents, or their agents, by their authority since they first took possession of the same.

The decree likewise directed that the respondents should be charged with the proceeds of the sales of any portion of the mortgaged premises.

The cause was again called to the attention of the court on December 27, 1884, and was referred to Bluford Wilson, one of the Masters of the Court, with directions to inquire and ascertain—

1. The amount of the principal and interest now due on

the three mortgages made by Leander J. S. Turney upon the lands in question.

2. The amount of taxes paid on the mortgaged premises by the defendants in the original bill, the complainants in the cross-bill.

3. The amount that the defendants in the original bill, the complainants in the cross-bill have received from the sale of any of the lands in question.

4. Whether the defendants in the original bill and complainants in the cross-bill have ever had actual possession of the lands in question, and if so, how much they have received in rents and profits from the same; or how much in rents and profits might they have received therefrom with reasonable care and prudence.

5. The amount in value of any waste in the removal of fences and buildings that the defendants in original bill, and complainants in cross-bill have committed on the lands in question.

The master was then directed to hear evidence, and report all the evidence before him and his conclusions on the foregoing questions.

The Appellants make no objection to the first, second and third of the directions given to the master. They complain of the fourth in which the master is directed to inquire whether the defedants ever had actual posession of the lands in question, and if so, how much they had received from rents and profits,

or how much in rents and profits they might have received therefrom by reasonable care and prudence.

And to the fifth, which directs an inquiry as to the amount of waste in the removal of fences and buildings from the lands in question by the defendant.

As these directions were the basis of the subsequent inquiries, as well as the conclusions of the master, it is proposed now to inquire as to the authority of the Court to consider either the question of rents and profits or of waste.

We insist that no such inquiries were warranted by the pleadings in the cause.

In the original bill exhibited by Turney he claimed that he was then in possession of all the lands.

In the amended bill of Turney and Adams it is claimed that Adams was the owner of the lands in fee simple, and had at the time "the custody and possession" of the same.

In the answer of the defendants, filed October 12, 1876, it is true that they claim to be in possession of the lands in that part of the answer in which they attempt to assert their title under the statute of limitations for seven successive years from July 21, 1863, but in the same answer they modify their claim to possession and characterize it as "the constructive possession."

The averments on both sides are to be considered in the first instance with reference to the issue that is proposed to be

made, and those referred to only amount to a claim of possession on the one part and a denial of possession on the other.

In no pleading of Turney or Adams is it claimed that the defendants were in actual possession of the lands, or that they were chargeable with rents and profits or for waste, so that the inquiries with respect to these subjects are not warranted by the pleadings.

And even if the pleadings gave the court the authority to consider the question of the actual possession of the premises by the defendants, and state an account between the parties as to rents and profits, and to go into the question of waste committed by defendants, the rule of liability is more stringent than is warranted by the rules of equity.

The general rule that a "mortgagee in possession, whether in person or by a tenant, is accountable for the rents and profits of the estate, and is bound to apply them in the reduction of the mortgage debt," is conceded.

It is also true that "as a general rule a mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise; but he will not be held accountable for more than the actual rents and profits unless there has been willful default or gross negligence on his part."

2nd Jones on Mortgages, sec. 1123.

The author very properly adds: "It is the fault of the mortgagor that he lets the lands fall into the hands of the mort-

gagee, and the mortgagor should be required to prove actual fraud or negligence on the part of the mortgagee before he can charge more than the actual receipts of rents and profits."

The mortgagee is also chargeable with waste permitted by him or his agents while in possession of the mortgaged property.

These general rules, however, are to have an actual application to the facts of each case, and it will be seen hereafter, in considering the report of the master, how they were understood and applied by him.

The Master made his report to the court that "the defendants in the original bill might, by reasonable care and prudence, have received rents and profits from the mortgaged premises, in addition to taxes and repairs, the sum of $350 per annum from July 21, 1863, to April 23, 1873, the date of the sale to Holmes, and after that at the same rate per acre on the lands held by them, down to December 31, 1879, and that they should be charged in the account between the parties, at that rate annually."

It will be observed from the consideration of the evidence, reported by the Master, that the lands were mortgaged by Turney to J. and J. Slevin in 1855, and that at the time there were two mortgages upon the lands, one for $900 in 1851, another for $337 made in 1853, and the inference that Turney was insolvent is fully justified by the evidence, and that John and James Slevin, the mortgagees, resided in Cincinnati, Ohio.

At the time of these transactions the lands were of very small value, and Adams, a resident of Fairfield, in Wayne county, near which the lands lie, was fully aware of their situation and value. He was also aware of the increased value given to the lands by the construction of a railroad.

The testimony shows that the improvements on the lands, whatever they were, were of the cheapest character, and that from the necessity of the case the lands were practically abandoned. From the time they were mortgaged by Turney until Adams, an enterprising man, familiar with the lands, determined to get rid of the claim of the mortgagees, acquired Turney's title, and then hit upon the device of a bill to remove the deed of Barkley as a cloud upon the title.

There might be a shadow of equity in a claim that the defendents were in some degree responsible for the constructive rents and profits of the lands and for the care of the improvements until Turney filed his bill on October 17th, 1874; or until Adams obtained a deed from Turney, which was on the 15th day of April, 1874, but that, under the circumstances of the case, when the mortgagor instead of offering to redeem the lands, and demanding an account from the mortgagee, attacks his rights and seeks to defeat them altogether, he can have no equitable claim against the mortgagees beyond the actual amount of rents and profits received, and so it may be said in regard to waste.

There is no pretense which can be justified by the evidence, that the defendants at any time were guilty of wilful spoilation

of the property: they destroyed none of the buildings, removed none of the fences and cut none of the timber.

Whatever may be said, it is manifest from the evidence that all that was none which can be characterized as waste was the acts of others, and not the defendants.

Persons who did the acts of alleged waste, which are greatly exaggerated, were residents of the neighborhood of the lands, well-known to Adams, who made no attempt, either by notice to defendants or otherwise to protect or preserve the property to which he then asserted title.

There is another strong fact, too, that even after the construction of the railroad, to which the master referred, Adams placed no higher value upon the lands than $10 per acre, making an aggregate of $36. (See amended bill, record page 6).

At that price the security afforded by the land was barely sufficient, and before that time was exceedingly scant.

The theory of the master that $350 per annum exclusive of taxes and repairs could have been realized from the land is wholly inconsistent with the valuation of the lands by Adams himself.

We have cited the rule which determines the liability of a mortgagee in possession; we have insisted that the proper limitation of the rule is, that he is not accountable for more than the actual rents, unless there has been wilful default or negligence.

We have pointed to the fact, which is fairly inferable from the evidence that at the time of the default of the mortgagor, the lands were of small value; that the buildings and fences upon them were of a cheap and inferior character; that the lands were not in demand for cultivation; that the mortgagees were non-residents of the state; that Turney, who claimed the land until 1874, and Adams, who claims to have acquired his title in April of the same year, lived near the lands, was acquainted with them, as well as with their yearly value, and that neither of them did any act looking to the discharge of the defendant's liens, made no suggestion to them of means by which the lands could be made profitable, but commencing in 1874 denied the rights of the defendants, and have since that time harassed them with litigation.

The measure of the duty of a mortgagee in possession, within the rules already stated, is to be determined by the circumstances, and we think that the circumstances to which we have adverted, show that the mortgagees in this case did all that could fairly be expected of them, and that they are not chargable beyond the very small sum actually received by them.

There is another consideration to which we invite attention, which demonstrates the fact that the rule adopted by the master, in fixing the liabilty of the defendants for rents and profits, is far more stringent than is warranted by the circumstances as they appear from the evidence.

We repeat, that in 1863, at the time when the defendants

attempted to foreclose their mortgage, the lands were of small value.

Charles A. Beecher described the situation of the lands with respect to improvements as they were in 1863, at the time at which he recorded the deeds made by Barkley, the special master in chancery.

He says when he first became acquainted with the tract of land, it was all under fence; he refers to 1854, (printed Record p. 71,) and says "it was a very poor slat fence; there was a wheat crop on the place in 1857; only a small portion of it was harvested, the balance of it was destroyed by cattle breaking through the enclosure." From that time forward there was no attempt made to keep up the fence around the 320 acre tract. There was a portion of the forty acre tract fenced; how much of it he does not know; does not think it was in a condition to protect crops, at the time the deeds were recorded in 1863. Shortly after that, they were all hauled away by parties other than Mr. Slevin.

From 1863, the time of the recording of the deeds, until 1872, he had charge of the property, as the agent of the defendants. There was no attempt made to rent it, and he testifies that it could not have been rented for anything; no application was made to him for it. He adds that from 1863 to 1872 there was no actual occupation beyond paper title, being of record. He says; "I think I had the exclusive charge of Mr. Slevin's business in relation to this property, from 1863 until he left the country which was in 1872.

"On a bill in equity to redeem lands from a mortgage, it appeared that the defendant who had entered to foreclose, lived in another state, and appointed an agent to manage the property, and there was no evidence of negligence in the appointment of the agent, or of fraud on the part of the mortgagee. Held that without other evidence of negligence than the testimony of the mortgagor's witnesses as experts, that a higher rent could have been obtained. The mortgagee should not be charged with a greater amount than he received as rent.

Gerrish v. *Black Exec.*, 104 Mass. 400.

If the testimony of Beecher, who is known to be an intelligent man, and who had the very best opportunity of knowing the actual situation of the lands from 1863 to 1872, is to be accepted as true, the defendants had no actual possession of the land; the people traveled over it, and had about as much possession of it as Slevin. It lay out in the commons, and one of the principal roads of Fairfield passed over the property. All the lands, except a few acres in section 6, lay out in the commons. There was no timber on it worth protecting."

There is some evidence that the defendants expelled Turney about 1872, who built a small house upon the lands, which the witness says was afterwards stolen by one Nally.

It will be seen by an examination of the testimony that Adams, a resident of Fairfield, and familiar with all the facts, made an extraordinary effort to discharge the lien of the defendants upon these lands by proof of an imaginary rental value, and fanciful suggestions of waste; but the weight of the testi-

mony is, that in 1863, when defendants recorded their deeds made by Barkley, there were in faet neither buildings nor fences on the land, or if there were either fences or buildings, the enclosure was small, and the buildings of very trifling value.

The Master, in his report, in discussing the question of possession; starts out bp saying, "Both parties, in their pleadings, claim to have been in possession of the mortgaged premises, pending and prior to this litigation." He the proceeds to analyse the repective claims of the parties .o possession, contrasts the value of the opposing allegations of each as evidence, refers to the testimony of various witnesses upon the point of possession, and concludes, as the result that the defendants had actual possession of mortgaged premises from July 31, 1863, to the 31st of December, 1879, with the exception of two or thret months in the year 1874, during which time Turney had forcible possession of the same.

The Master, in this, overlooks the legal fact that it was impossible for him to find in favor of Adams; that the defendants were in possession of the land in opposition to his repeated averments; that during all the time in question that Turney and himself had actual possession of the land themselves.

The master misconceives the office of pleadings, and also forgets that no issue of fact can be found in favor of a party in opposition to his own distinct avermènt to the contrary.

The master is also mistaken in giving a controlling effect to the decree of December 31st 1879. He says, (printed Record p. 160) that "the decree was made upon the theory that John

and James Slevin had possession of the entire mortgaged premises, and by reason of such possession had become liable for rents and profits, and waste.

By reference to that decree, it will be seen that the language of the court is (see printed record, p. 25), "That from such amount due on said mortgages, and the taxes and interest paid by said defendants on said land, shall be deducted all rents and profits derived from said lands by said John Slevin and James Slevin, and those holding under them, for such times as they, or those holding under them have been in possession of said lands or any part of them; to say nothing more upon the point that the complainant's bill contains nothing to warrant the portion of the decree referred to by the master, or that it is in direct opposition to the claim of possession in themselves, made by the complainats; the decree is merely tentative and decides nothing upon the point in question.

The master's conclusion, deprived of the support which he finds in the decree, is wholly unwarranted. The master says that, "even if the land had been wholly uhinclosed from the first, the taking therefrom of wood for fuel, fences and other purposes, which there is abundance of evidence to show was done within the easy means of knowledgs of the Slevin's or their agents, would have been sufficient to establish in law, actual possession," and he refers to the case of *Austin* v. *Rust*, 73 Ill., 491, to support the proposition stated. He seems not to have observed the distinction which exists between the legal possession in the case he cites, and the actual possession in

fact, which lies at the foundation of the liability of a mortgagee in possession of lands, for rents and profits.

We conclude upon this point by repeating that the testimony of C. A. Beecher, who was the agent of the defendants, as to the actual situation of the lands in 1863, who had the means of knowledge. and whose duty it was to know, corroborated, as it is by facts and circumstances already adverted to, establishes, beyond reasonable doubt, that from 1863 until 1872, he, like the defendants, supposed themselves to be the owners of the lands under the deeds made by the special master, and that the defendants continued in that belief until the decree of December 31st, 1879, when the deed was cancelled by a decree of the Circuit Court.

That at the time of the recording of the deeds before mentioned, the lands were uninclosed and have so remained.

That defendants had only constructive possession of the lands; that the complainants have, from the beginning, refused to treat the defendants as mortgagees in possession, and have attempted to defeat their rights by the assertion of an adverse title.

And we insist that it would be a shamful abuse of the powers of a court of equity to allow the complainants, in opposition to their own persistent claim of an adverse right, and of an exclusive possession of the lands, to now treat the defendants as mortgagees in possession, and extinguish their whole debt by charges for constructive rents and profits.

The Master, finding that the allowances made by him in favor of the complainants were not sufficient to absorb the entire amount due to the defendants upon the lands, proceeds to give them the benefit of what is called the waste, committed by the defendants, and he does this under the alleged authority of the directions contained in the decree of December 31, 1884. (The direction upon which he relies will be found on page 29, printed record.)

"5. The amount in value of any waste in the removal of fences and buildings, that the defendants in the original bill, and complainants in cross-bill, have committed on the lands in question."

We have to remark with reference to this direction, as we have with that relating to rents and profits, that the complainants do not by their pleadings concede or allege that the defendants are mortagees in possession, nor do they offer to redeem the premises, nor do they allege that that the defendants have committed waste.

The order then was made in disregard of the pleadings, and gives to the complainants the benefit of a position they have nowhere claimed the right to occupy.

The Master proceeds, however, (p. 164 printed record) to treat the subject of waste, and as preliminary to the consideration of the subject says: "It appears from the evidence of C. A. Beecher, Boggs, W. W. George and G. J. George that the premises were under fence when the Slevins took possession in 1863, though the parties differ as to the condition of the fences.

Mr. Beecher states that they were originally very poor, and were all hauled away by parties other than the Slevins, soon after the above date. The master then says: "This should not have been permitted, and as we have seen it was the duty of the Slevins, or of Beecher, their agent, to have protected the property, to have repaired the fences, if poor, and to have replaced them at the cost of the estate when worn out. Their neglect to do was clearly waste."

It is not easy, we repeat, to understand exactly what the master means in this statement of his conclusions. He assumes the truth of Beecher's statement that in 1863, when the defendants recorded the deeds made by Barkley, and believed themselves to be the legal owners of the land, they became bound to the complainants to expend money in the repair of fences around the land, in anticipation of possible rents to whice they were to look for reimbursement.

We venture to say that this proposition has no support either by authority or principle—and if the proposition was true in its application to the rights of parties where the relation of mortgagor and mortgagee is recognized by both, it can have no application to a case where the relation is denied by both parties, as was the case in the present instance.

It is true that on December 31, 1879, the court decreed the cancellation of the deeds made by Joseph G. Barkley on July 21, 1863, and it is also true that the court, by the same decree, restored to the defendants, all their legal and equitable rights under their mortgages.

Until that decree both the parties had claimed the lands in fee under hostile titles. We think it a sound proposition that, conceding the power of the court to render that decree, the relation of mortgagor and mortgagee did not exist between the parties.

We renew our protest against that perverted idea of equity which would permit the complainants for a quarter of a century to contest the rights of the defendants under their mortgages by the assertion of an adverse title, and then seek to treat them as mortgagees in possession, and impose upon them the most stringent obligations incident to that relation.

And something might be said in support of this cloim of the complainants, if the defendants had expelled them from possession, but it is a notable fact that the premises were not occupied by anyone at the time defendants' deeds were recorded.

We scarcely think it necessary to comment upon the vague and unsubstantial testimony relied upon by the master to support his allowances "for buildings removed, $250; for the fences permitted to be hauled away, one-third of the value of a new one, $350", or "For the timber cut and removed; fifty logs sold to Gaddis by George at fifty cents each; 5000 rails at $35 per 1,000, cord wood and stakes," making an aggregate allowance for the above items as for waste $810.

The first of these items, for which the master makes an allowance, is for a dwelling house, and the reliability of the evidence upon which he makes the allowance, will be perceived when we quote from his report, that "Its value is stated in the

evidence all the way from fifty to seven or eight hundred dollars." He says, "It is immaterial for the purpose of this inquiry whether George sold the house to Nally or not.

The actual history of the house seems to be that Turney built it (a very cheap affair), upon the land with the view of taking possession. He put a man named Nally in possesssion of the house; Nally abandoned it, and some witnesses say that G. J. George, the agent of the Slevens, sold the house to one Sloan, who moved it to a lot in the town of Fairfield, which adjoined the land.

G. J. George, in his examination, (p. 73 printed record) merely claims that as a partner of Mr. Beecher he was an agent of J. and J. Slevin, but he does not differ from Mr. Beecher in regard to the possession of the lands, nor any other point, while G. R. George, who is a lawyer, (see printed record, page 80) says he did not sell it to Nally, but on the contrary Nally "stole the house"; that it was built by Turney in order to get possession of the land. There is no just pretence for charging the defendants with the value of this house, and indeed the defendants may well insist that the report of the Master, by which he charges the defendants with the sum of $810, for alleged waste, is supported only by the vague and unsatisfactory testimony of witnesses, such as may be collected by any enterprising party, who, depending upon a ready memory, will furnish conjectures and vague reminiscence as substantial facts.

The exceptions of the defendants to the report of the master were overruled, and his erroneous conclusions, based upon testi-

mony such as we have described, was made the foundation of the decree of the court.

The Master, by ingenious calculations, finally concludes that the defendants are indebted to the complainants for rents and profits and waste, in the sum of $77.58, their whole debt and interest being absorbed by the processes we have attempted o described.

We are confident that a decree, predicated upon such premises, ought to be, and will be reversed.

JOHN M. PALMER,
For Appellant.

No. 243.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1889.

AUGUST TRUM, TRUSTEE OF J. AND J. SLEVEN & CO., APPELLANT,

vs.

LEANDER J. S. TURNEY AND ROBLEY D. ADAMS, APPELLEES.

IN CHANCERY TO REMOVE DEED AS CLOUD AND DECLARE MORTGAGE SATISFIED.

APPEAL FROM THE CIRCUIT COURT OF THE U. S. FOR SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT AND BRIEF OF APPELLEE.

R. P. HANNA, Attorney for Appellee.

Press Print, Fairfield, Illinois.

IN THE

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AUGUST TRUM, TRUSTEE OF J. AND J. SLEVEN,
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vs.
LEANDER J. S. TURNEY AND ROBLEY D. ADAMS, APPELLEES.

STATEMENT OF CASE AND BRIEF OF APPELLEE.

THE REFERENCES ARE TO THE PAGES OF THE PRINTED RECORD.

STATEMENT OF CASE.

This case comes to this Court on appeal from a decree of the Circuit Court of the United States for the Southern District of Illinois, rendered on the 12th day of March, A. D., 1886, recovered by Appellees against Appellant.

The facts as disclosed by the record in this case are as follows:

In the year 1851 Leander J. S. Turney was the owner in fee of the E½ of Sec. 36, T. 1 S., R. 7 E.: and N.W. N.W., Sec. 6, T. 2 S., R. 8 E.: and Lot No. 7 in Fairfield, Illinois; all of said real estate being in Wayne county, Illinois.

In July, 1851, said Turney executed a mortgage on all of said real estate, to Charles W. Eldridge, to secure a promisory note of $900.00, due one year after date.

In July, 1853, said Turney executed a second mortgage on all of said real estate to Edwin Beecher to secure a note of $337.00, due one year after date.

And in November, 1853, said Turney executed a third mortgage on all of said real estate to John and James Sleven, to secure one note of $2,000.00, due two years after date.

In November, 1855, petitions in chancery were filed in the Circuit Court of Wayne county to foreclose all of said mortgages: and at the April Term, A. D., 1856, all of said causes were sent by change of venue from the Circuit Court of Wayne County, Illinois, to the Circuit Court of Clinton county, Illinois.

All of said causes appear to have been placed upon the trial docket, of the Circuit Court of Clinton county, at the May Term, A. D., 1856: but no decree of any kind whatever appears upon the records of the Circuit Court of that county in any of said causes; nor does the records of the Circuit Court of that county show that

such causes were pending in said Court at that term, or at any other term.

Joseph G. Barkley, the Master in Chancery of Wayne county, having been informed, or in some way understood, that decrees of foreclosure had been rendered by the Circuit Court of Clinton county in all of said causes, and that he had been empowered, as such Master, to sell all of said lands under said decrees: and it is alleged by Appellants, that he, as such Master, did sell all of said lands at the door of the court house in Wayne county; and it is admitted that he issued certificates of purchase to C. A. Beecher, Attorney for Complainants, J. and J. Sleven, and that he sent a report of such sale to the Clerk of the Circuit Court of Clinton county, and the same was filed among the papers in said causes.

It is alleged in a cross-bill, filed in this cause by these Appellants, (see page 17 printed record) that C. A. Beecher assigned all of these certificates of purchase to John and James Sleven, and that they thereby became the equitable owners of the mortgages executed by Turney to Charles W. Eldridge and Edwin Beecher.

It is admitted by all parties to this suit, that all of these sales were set aside at the August Term, A. D., 1860, of the Circuit Court of Clinton county, (see page 18 of printed record) on the application of Mr. Turney.

The proceedings to set aside these sales do not appear of record among the Circuit Court proceedings of Clinton county, but among the papers of the case appears the petition of Turney to set aside these sales because there

were no decrees to base them on, and an order of the Judge setting the sales aside in all of the cases.

In 1861 Mr. Turney was appointed by President Lincoln Secretary of Washington Territory and departed for the Pacific Slope, and did not return to Illinois until 1874.

Nothing further appears to have been done under the foreclosure proceedings, and they seem to have been entirely abandoned after the August Term, A. D., 1860, of the Circuit Court of Clinton county.

On the 21st day of July, 1863, Joseph G. Barkley, the Master in Chancery of Wayne county, aforesaid, executed to John and James Sleven what purported to be a Master's deed, for all of said real estate, on the certificates of purchase above referred to, and said deeds were on said 21st day of July, 1863, spread of record on the record book of deeds in Wayne county, Illinois.

About the time these pretended Master's Deeds were recorded, or some time in the summer of 1863, John and James Sleven, through their agents and attorneys, took possession of all of said lands, and rented portions of the same to different persons to cultivate, and sold all the valuable timber off of a grove of 70 to 80 acres of valuable timber standing and growing upon the land, and continued to rent portions of said lands, and sell timber off of other portions, until the year 1874, when all the fencing around said lands was removed by the Slevens and their agents, and in 1874 said lands were all turned out to the commons, except the N.W. N.W., Sec. 6, T.

2 S., R. 8 E., which they had rented to Rider Bros., and one other 40 acre tract they had sold to Oliver Holmes for $1,600 00. Two dwelling houses, during this time, or while the Slevens had the land in possession, were also taken off of said lands, but by whom the evidence does not show.

In the spring of 1874 said Turney returned from Washington Territory, and finding all of the lands abandoned by the Slevens, except the 40 acre tract they had rented to Rider Bros., and the 40 acres they had sold to Oliver Holmes, he, Turney, took possession of the remainder of said land—being 280 acres—and erected a small frame house on said land, and put a tenant in the house he had erected; and within a few weeks after the tenant was put into the house a suit of forcible entry was commenced by the Slevens against Turney's tenant, and before the day of trial the tenant moved out and the Slevens again were in possession of the land and house erected by Turney. The Slevens sold this house, and a man by the name of Albert Sloan purchased it, and it was removed off of the land, and onto a lot in Fairfield, and is now being used as a residence.

At the time Turney had his tenant in this house—to-wit: October 17th, 1874,—he filed in the Circuit Court of Wayne county the original petition in this cause, asking that the above mentioned deed executed by the Master in Chancery to John and James Sleven be declared void and a cloud on the title of said Turney, and the petition alleges that he is the owner of the fee to said land.

This petition is exceedingly brief, makes no mention of the mortgages, but simply asks to remove the *deeds* as a *cloud* on the title of Turney to the land.

No service was had on any of the Defendants and in April, 1875, said Turney conveyed all of said land to Robley D. Adams, one of Appellees herein.

August 14th, 1876, Turney and Adams, the Appellees herein, file their amended petition setting forth more fully the history of the deed executed by the Master in Chancery, and represent that it purports to be based on a decree of foreclosure of a mortgage in the Circuit Court of Clinton county, Illinois, made at the August Term, 1860, thereof; this petition expressly charges that there never was any such decree rendered at the August Term of said Court, or at any other time; and expressly charge that said Master had no power or authority to execute said deeds, or either or any of them; and that the same are clouds upon the title of said Adams; that they tend to hinder and prevent him from making sale of his said land, and avers that said Robley D. Adams is, and was, at the time, the lawful owner of said land.

This petition alleges that John Sleven has departed this life, and left Thomas E. Sleven his only heir at law and makes all of the Appellants herein Defendants, etc.

Service is had on all of the Defendants, and they all join in answering the petition, and an issue is made upon this petition.

By this answer the Defendants claim the legal title to the land by virtue of the foreclosure proceedings in

Clinton county in 1856, and a sale by the Master; they answer that C. A. Beecher, the attorney for the Slevens, purchased at the sale and transferred his certificate of purchase to J. and J. Sleven, and the Master executed the deeds that are sought to be removed as clouds. They deny that these deeds are clouds, but they aver that they are legal titles, based on decrees rendered at the May Term, 1856, of the Clinton Circuit Court. The answer denies that Turney had any title to convey to Adams in 1875 when he makes the deed to Adams.

This answer does not claim title in Appellants (Defendants below) by virtue of any of the limitation laws of Illinois, but expressly bases their title on the legality of the foreclosure proceedings in Clinton county.

The Complainants in the petition being citizens of the State of Illinois, and all of the Defendants residing in other states, and the amount in controversy exceeding $500.00 exclusive of costs; on petition and bond filed, as provided by act of Congress, this cause was at the October Term, 1876, of the Wayne Circuit Court, certified to the Circuit Court of the United States for the Southern District of Illinois; and on the 2d day of January, 1877, the record and transcript were filed in that Court.

On the 2d day of March, 1877, a cross-bill was filed by John Sleven, Thomas S. Sleven, James S. Sleven, John F. Sleven, August Trum and Anthony Shanter—being all of the Defendants in the cause. In this cross-bill it is alleged that there never was any record of

the foreclosure of any of said mortgages in the Circuit Court of Clinton county as set forth in the Master's deeds, or at any other time, and that the Master's reported sales were by said Court, all set aside on application of Turney, *and by consent of all parties.* (See page 18 printed record.) Cross-bill further alleges that decrees of foreclosure had been prepared, but were "*lost or stolen*," and had "*never been spread of record.*" (See page 20 printed record.) Cross-bill also alleges that the *Appellants herein have had possession of all of said real estate since 1863.* (See page 19 printed record.)

This cross-bill is sworn to by John J. Sleven, one of the Defendants in the petition, and one of the Appellants in this Court. (See page 21 printed record.)

The prayer to this cross-bill is in substance that the Circuit Court of the United States make such a decree as the Circuit Court of Clinton did make, or should have made, and such as the evidence may show that Court intended to make, and contains general prayer for relief.

At the same time that this cross-bill was filed, a stipulation was filed, in which it was stipulated and agreed, that the Circuit Court of the United States might make and enter any decree, under the pleadings in this cause, that the Circuit Court of either Wayne or Clinton could make in the case, touching the interest of either party in this case. (See stipulation on page 12 printed record.

April 10th, 1877, a demurer was filed to the cross-bill (page 23.) Demurer to cross-bill sustained (page 24) with leave to amend cross-bill. The cross-bill was not

amended, and no issue was ever made on the same. From this time on the case proceeded on the issue presented by bill and answer. The cross-bill being the sworn statement of one of the Defendants, is only considered as evidence in the case as to the facts alleged in it.

December 31st, 1879, the cause was heard on the issue made on the bill and answer and evidence, and a decree was rendered declaring the deeds executed by the Master in Chancery to John and James Sleven to be void and a cloud on the title of Appellee Adams, whom the Court finds is the owner of the equity of redemption to said lands and restores the Appellants to all their rights under all of said mortgages. This decree was, in fact, made by consent of all the parties, while it is not so expressed on the face, yet it confirms the sale of one 40 acres of said land to Oliver Holmes for $1,600.00, and provides for the money being a credit on the amount due on the notes and mortgages. In all other respects it treats the Appellants as mortgagees in possession, and refers the case to the Master of that Court to take an account of the amount due on all of the mortgages, and all tax paid, and all costs and expenses of every kind expended by Appellants in preserving the estate; from which is to be deducted all amounts received for sale of any of said land, and all rents, and all wastes committed by Appellants while in possession, either by themselves or their tenants.

On the 27th day of December, 1884, (page 28) a further order was entered refering said cause to Bluford

Wilson, as Master, with specific directions to take evidence and make a full report of his findings, and conclusions, and report the same to the Court with all evidence taken.

May 18th, 1885, the Master, Bluford Wilson, files his report; in which is embraced a full review of the evidence and facts proven, and his conclusions of the law governing the case, citing fully his authorities, and reporting all the evidence into Court.

The Master finds from the evidence submitted in the case that John and James Sleven were the equitable owners of all three of the mortgages executed by Turney on the land in question, and that there would be due on all of said mortgages on the 21st day of July, 1864, as principle and interest the sum of.....$5342 35

That costs had been paid by J. and J. Sleven in and about said foreclosure suits to amount of. 352 13

Making due Appellants.....$5694 48

The Master also finds that in July, 1863, said J. and J. Sleven entered into possession of all of said real estate as mortgagees, and continued to occupy said land as mortgagees in possession until December, 1879, except one 40 acre tract of said land that was sold to Oliver Holmes for $1,600.00, which amount was paid to J. and J. Sleven April 23d, 1872.

The Master finds that the entire 360 acres was all under good fence when Appellants took possession, and 280 in cultivation—80 acres being in timber. That all

of the land that was in cultivation would rent for $2.00 per acre cash per annum; or $1.50 per acre per annum over and above taxes and repairs. The Master takes this as the basis of his calculation, and charges Appellants, and credits Appellees with $1.50 per acre per annum for the land in cultivation, and makes no further account of tax paid.

The Master finds that waste was committed by the Appellants, during the 16 years they occupied said land, to amount of $810.00. This consisted in the destruction and selling of timber, selling and removing buildings on said land, and removing all of the fence that was on said land.

The Master also finds that Appellants received $400 for the lot in Fairfield that was included in the mortgage and sold to Barkley, and that they received $800.00 from Rider Bros. for the sale of one 40 of said lands, and that all of these sales were ratified and confirmed by Appellees.

These amounts, together with the rents each year, over and above tax, the Master places as a credit on Appellants' notes and mortgages, and finds that Appellants have been fully re-imbursed and paid all amounts due them on all their three notes and mortgages, and all tax and expenses incurred by them, and $77.58 over; and recommends that the final decree find the title to the 280 acres of land not sold, be in Appellee Robley D. Adams, free and clear of all claims of any kind growing out of said mortgages; and that all of said mortgages are fully

paid off and satisfied. (Master's report pages 151 to 168.)

On June 26th, 1885, exceptions to Master's report filed. (Page 169.)

March 12th, 1886, after full hearing by counsel, final decree rendered in accordance with the report of the Master. (Decree on page 170-172.)

May 19th, 1886, order allowing Defendants an appeal to Supreme Court upon their entering bond in the sum of $500 within 90 days. (Page 173.)

August 5th, 1886, August Trum, one of Defendants filed his appeal bond with Florence Marmet and Bernard Trum securities.

Clerk's certificate. (Page 175 printed record.)

BRIEF OF APPELLEE.

The amended petition filed in the Circuit Court of Wayne county by Appellees, which was transferred to the U. S. Circuit Court for Southern District of Illinois, only asked that the deeds executed by Joseph G. Barkley to the land in controversy be declared a cloud on the title of Appellee, and that the Apellee's title be freed from such cloud.

That the deeds were executed by Barkley without any authority in him, or any one else, to sell the land, or execute deeds to the same, was not questioned, but was admitted in the hearing of this cause in the Circuit Court. And that no authority did exist in said Barkley by virtue of any decree of the Circuit Court of Clinton county is abundantly established by this record.

Appellants all join in an answer to this petition in which they claim title to the land by virtue of a decree of foreclosure of mortgages executed by Turney, and answer that such decrees of foreclosure were had at the May Term, A. D., 1856, of the Circuit Court of Clinton county, Illinois, (see page 7 of printed record) but on 2d of March, 1877. Appellants all join in a cross-bill, which is sworn to by John J. Slevens, one of Appellants, in

which they aver, "*That the decrees of foreclosure have been lost, stolen or destroyed, and were never recorded among the records of Clinton or Wayne counties; that diligent search had been made for them for a number of years past by Attorneys, and other interested persons, and they could never be found.*" (Page 20 printed record.) And on page 18, printed record, in the sworn cross-bill it is averred that the sales had all been set asid "*by consent of all parties.*"

Under this admitted state of facts the Circuit Court could do nothing but set the decrees aside, and declared them clouds on Appellee's title. This was all the relief Appellees asked for, and all they obtained by the decree of December 31st, 1879. Whatever else there is in that decree is entirely in the interest of Appellants, of which they cannot now be heard to complain. The Court had, before the rendition of the decree of December 31st, 1879, sustained a demurer to the cross-bill, but under the stipulation filed (page 12) the Court, in addition to granting Complainants the relief asked, also decreed that the Appellants be restored to and fully protected in all their rights under these mortgages. That an account be taken of all amounts due them under all three of the mortgages and all taxes paid by them, and costs and expenses incurred by them in preserving the estate. On the principle that "he that would have equity must do equity" the Court decreed, that as a condition to Appellees having these void deeds removed as clouds, they must pay to Appellants all that was due them. This decree was

most favorable to Appellants. All of their mortgages, and the notes they secured, were then barred by the statute of limitation then in force in Illinois. Their mortgages had not been foreclosed, and under the limitation laws of Illinois the Appellants would be powerless to foreclose them. The only relief that could be afforded Appellants at that time, was to consider and treat them as mortgagees in possession. This protected them against the statute of limitation; secured to them all their rights and equities in the land, the amount due Appellants under all three of the mortgages, the amount of taxes paid by them, and all costs and expense in any way incurred by them in protecting and preserving the estate was thus fully secured to them. And, on the argument of this cause before the master, it was admitted and contended by Appellants that this decree of December 31st, 1879, was entered by agreement and consent of all parties (see Master's report page 160 and 161) and nowhere in this record will be found any exception or objection made by any one to that decree.

That the Slevens took possession of all this land in the summer of 1863 is abundantly proven by the evidence of Albert Sloan (page 38), Amanda Gaston (page 40), Malinda Knight (page 40), John T. Fitzgerrel (page 42), Samuel Linder (page 43), Harvey T. Stewart (page 44), Joseph Williams (page 45). From the testimony of all of these witnesses it is clearly proven that John and James Sleven had possession of all of said land—360 acres—from the summer of 1863 until the commence-

ment of this cause and until the hearing of the same, December 31st, 1879.

The evidence of R. L. Boggs (page 30), Wm. W. George (page 31), Adam Rinard (page 32), Ezra T. Hall (page 33), and G. J. George (page 34), establish most conclusively that the land was all under good fence, and would have rented for $2.00 per acre per annum, or more if rented for a portion of the crop.

G. J. George, agent and attorney for John and James Sleven, says (page 34) the land would have rented for $1.50 per acre over and above tax and repairs. Mr. George swore that the Slevens rented portions of the land during all of this time, but does not know the amount of rent they received.

The Master in making his estimate, and accounting of rents, takes this estimate of Mr. George, and charges Appellants with rent at $1.50 per acre per annum, for the land that was susceptible of cultivation, and makes no further accounting of tax.

Appellants make no account or charge for anything expended in preserving the estate except taxes and costs paid by them.

Mr. George also testifies that S.W. S.E. Sec. 31, T. 1 S., R. 7 E—40 acres of the land included in the mortgage—was sold to Oliver Holmes for $1600.00, and that John and James Sleven received the money, and that lot No. 7 in Fairfield, being also a portion of the mortgaged premises, was sold to D. W. Barkley for $450.00, which money the Slevens received. And that

during the pendency of this suit Rider Bros. have paid Slevens and their Trustee—Appellants here—$800.00 for one 40 acre tract of said land.

The sale of these portions of the mortgaged premises were confirmed by the decree of December 31st, 1879, and Appellants were ordered to be charged with the amounts then received by them.

The evidence also shows, and the Master finds, that waste was committed by Appellants, and those they represent, to the amount of $810.00.

This is a very low estimate of the waste committed, and much less than the evidence would justify. The evidence of Albert Sloan shows that one house, sold by the Slevens in 1876, was worth $700 to $800, and would rent for $8.00 per month. It is used as a residence at this time, has only been moved a few yards onto a lot in Fairfield. (See page 38.) The evidence of Dr. E. T. Hall (page 33) estimates the cost of the fence to put the land in the condition it was when Slevens took possession at $1000.00, and G. J. George estimates the damage to fence, or cost of replacing the fence, at $700.

The evidence of Malinda Knight shows that two houses were removed from the land while in possession of the Slevens. (See page 41.)

The evidence of John Gaddis (page 46), and Joseph Williams (page 45), and Samuel Linder (page 43), show that the grove of timber standing and growing on the land, at the time the Slevens took possession, was entirely destroyed, and appropriated to their own use, and was of value greatly to exceed the amount estimated by the Master in his report in this cause.

In the report of the Master, to whom this cause was referred, the most favorable view the evidence was susceptible of has been indulged in towards Appellants. With this the Appellees are content. Appellees only ask that the pretended deed executed by Barkley, and put upon record by J. and J. Sleven, be removed as a cloud and declared a nullity as a conveyance. And all that in equity may be due Appellants these Appellees are willing to pay, and as the evidence shows have fully paid. With the accounting made by the Master the Appellants certainly have no cause to complain.

In the exceptions filed to the Master's report by Appellants (see page 169) seven exceptions are enumerated and set forth.

The first is that the "Master finds that Appellants, "the exceptants, were at certain times in the possession "of the land in controversy, when in fact they aver that "they never were at any time in the possession of said "land."

On this point the evidence is so overwhelmingly against Appellants, and so fully sustains the finding of the Master, that a bare reference to the evidence of some of the witnesses will settle all controversy on this question.

In the answer filed by the Appellants to the petition in this case, they answer that they are in the "*constructive possession*" of said land. The evidence of Albert Sloan, Malinda Knight, John T. Fitzgerrel, Samuel Linder, Harvey Stewart and G. J. George, heretofore referred to, show that their possession was *actual* from 1863 until 1874, and to a portion of the land until 1879.

Was any error committed in the Circuit Court by adjudging the Slevens to be mortgagees in possession of the land in controversy? They had mortgages on the land that entitled them to the possession. The mortgages were never foreclosed. They took possession of the land, and continued in possession for ten or twelve years. And they had no rights, or pretended rights, in the lands except by virtue of these mortgages. What were they then, we ask, but mortgagees in possession? And being mortgagees in possession of these lands they should be compelled to account as such.

The fact that they induced the Master-in-Chancery to execute deeds to them, does not in any way change or better their position.

Taking deed under the certificates of purchase, after the sales had been set aside by order of the Presiding Judge, "*and by consent of all parties*," was a fraud on the Court; and a fraud on the rights of Turney, who was then in Washington Territory, and could have had no knowledge of the fact; and the Circuit Court very properly sustained the demurrer to the cross-bill and refused to aid Appellants in perfecting their title, based on such an illegal and inequitable foundation.

When parties having mortgages on land, acquire title to land under an erroneous decree, or illegal sale, the Court will treat them as mortgagees in possession, rather than trespassers.

Bigler vs Waller, 14 Wallace, 297.

Harper vs Ely, et al., 70 Ill., 584.

Roberts vs Fleming, 53 Ill., 204.

In the case of Harper vs Ely the Court says: "Ely, "the owner of the debt, was rightly in possession as "mortgagee for condition broken, and not as a tres- "passer."

"The fact that a fraudulent sale was made, does not "give the mortgagee any greater rights than he other- "wise would have, had no sale been made. The sale "having been fraudulent and set aside, leaves the "mortgagee in the same position as he was before the "sale."

And in Roberts vs Fleming, et al., *supra*. The Court in setting aside a sale for illegality lay down the rule for accounting between the parties under such circumstances as follows: "The Master, in stating the "account, should credit and allow the mortgagee the "amount of his mortgage debt with interest. He should "also be allowed for all taxes paid upon the land, and all "reasonable repairs made upon the premises, and owing "to the delay in filing the bill to redeem, he should be "allowed for permanent improvements. On the other "hand he should be charged with amount he bid at "mortgage sale, and all rents and profits received, *or* "*which might have been received, by reasonable effort and* "*proper management of the property.*" The case of Bigler vs Waller, 14 Wallace, page 297, is direct authority on this point.

This is precisely what the Court done in the case at bar. The Court declared these deeds void, and a cloud

on the title of Appellee, and then ordered an account to be taken as in ordinary cases of Mortgagee in possession.

That the sales to the Slevens, in the foreclosure proceedings, were never *approved by the Court;* but were set aside by order of the Court, and by *consent of all parties* is positively shown by the cross-bill filed by all of these Appellants, and sworn to by John J. Sleven, one of the Appellants in this case. (See printed record, page 18.)

Appellants assign for error that the Court sustained a demurrer to the cross-bill filed by Appellants.

In this cross-bill three important averments are made:

First, It avers that there never was any record of decree of foreclosure of said mortgages in Wayne or Clinton county.

Second, It avers that the sales were never approved by the Court, but were set aside by the Court, and by *consent of all parties*.

Third, It charges that the Slevens took deeds under these sales, and have been in possession of the lands since they took the deeds in 1863.

If there never were any decrees, to base these sales upon, the Slevens, being parties to the suits, are chargeable, with notice of that fact.

If these sales were all set aside, by order of the Court, because there were no decrees to base them on, and by "*consent of all parties*," the law charges the Slevens with full knowledge of these facts; and to take deeds afterward, on such certificates, was a fraud both in

law and in fact, and when they came into a court of equity, by their cross-bill, under such circumstances, and ask the aid of the Court to perfect a title thus derived, the Court cannot do otherwise than dismiss their cross-petition, and admonish them, that suitors must approach courts of equity with "clean hands."

But on page 23 of Appellants' brief reference is made to the Statute of Illinois, and Appellants claim a *legal title* to the lands by virtue of Sec. 6, Chap. 83, of Starr & Curtis' Statute. If Appellants have already a *legal title* then there is no necessity of invoking the aid of a court of equity, by cross-bill, to perfect their title.

The statute quoted by Appellants is as follows: (See page 23 of Appellants' brief.) "Every person in the "actual possession of lands or tenements, under claim "and color of title, *made in good faith*, and who shall for "seven successive years continue in such possession, &c."

Counsel for Appellees are of the oppinon that the Court will be reluctant to hold, that deeds acquired, as the deeds in this case were acquired, were titles made in "*good faith*." Appellants were parties to the record in the foreclosure proceedings in Clinton county, and they are conclusively presumed to know all the record contains, and to be cognizant of every fact disclosed by the record. When the sales were set aside by the Circuit Court of Clinton county, at the August term, 1860, Appellant John Sleven had just as conclusive knowledge of that fact as he had on the 27th day of February, A. D. 1877, when he swore to it in his cross-bill, in which the

setting aside of the sales is averred. He had also just as conclusive knowledge that no decrees of foreclosure had ever been obtained, as he had when he makes that averment under oath in his cross-bill. Hence there can be no holding possession in "*good faith*," under these deeds, by Appellants, who were parties to the suit to foreclose.

Appellants occupy inconsistent positions in this case. Under one assignment of error they complain that the Court erred in sustaining a demurrer to their cross-bill, and thereby refused them a decree perfecting their title; and then Appellants complain that the Court erred in not holding that their title was already perfect under the Statute. Counsel for Appellees can readily understand how Attorneys for Appellants can entertain either one or the other of these positions; but we are unable to comprehend how they can press both theories upon the Court, with equal assurance, at the same time.

If the title of Appellants was a valid legal title, then they had no need of the aid of a Court of Equity to assist them in perfecting their title. If their title was not valid and legal, then we assume that a Court of Equity cannot aid a party in perfecting a title by prescription.

But in the answer of Appellants to the petition of Appellees they answer that they have a "legal title by "virtue of a decree of foreclosure, had in the Circuit "Court of Clinton County, on a change of venue from "the Wayne County Circuit Court, rendered at the May "term, 1856, at which sales Charles A. Beecher became "the purchaser, and assigned his certificate of purchase

"to J. and J. Sleven, to whom deeds were executed July "21st, 1863." (See printed record, page 7.)

This is the answer of Appellants in the trial Court. They nowhere answer that they claim title by prescription, or by limitation; but they claim legal title by virtue of the foreclosure proceedings in Clinton county, and by this position their title must stand or fall.

The Court will not plead the statute of limitation for a party who does not plead and rely upon it himself. Nor will the Court interpose a title by prescription in chancery, when the defendant does not answer and rely on such a title. All reference to a title by limitation, or by prescription, is foreign to the issue in this case.

O'Hallaran vs Fitzgerald, 71 Ill., 54.

School Trustees vs Wright, et al., 12 Ill., 441.

It is again assigned for error that the Court found that Appellee Adams was the owner of the land in controversy; and that his proof of title is insufficient.

In the answer filed by Appellants the Appellants answer that "L. J. S. Turney was the owner of the land "in question in fee simple." And they further answer that Turney conveyed the land to Appellee Adams, and they charge that Adams took his deed to the land with a full knowledge of the rights of Appellants, defendants below. (See page 6 and 7 of printed record.) After Appellants had admitted, by their answer, that Turney was the owner of the land in *fee simple*, and that he conveyed the land to Adams by deed, further proof of title in this suit would seem to be unnecessary. It is true,

the answer further avers, that the deed from Turney to Adams was with a full knowledge of the rights of Appellants, and that Adams paid no consideration to Turney for the land. The question of consideration is not one that concerns these Appellants. That would be a matter entirely between Turney and Adams. For the purpose of maintaining a suit to remove the deeds as clouds, Adams would have to show he was the holder of the legal title; but if this is admitted by the answer, this is sufficient, and releaves the Appellants the necessity of proof on that point.

In the exhaustive brief of Appellants (page 26) the question is pressed upon this Hon. Court that the evidence does not show that Appellees, either Turney or Adams, were in the *actual possession* of the lands at the time of filing this bill to remove the deeds as clouds. As a general rule a party to have standing in a Court of Equity to remove a cloud must be in *possession*, otherwise his remedy would be in *Ejectment*. That doctrine has no application to this case, or to cases similar to this. In this case the Appellants had a mortgage on the premises that entitled them to the possession of the land after condition broken; under this mortgage the Appellants took possession, and they were entitled to possession until their debt was paid. A Court of Law could not adjust the equites between the parties. Appellants had paid tax on the land, had sold and removed valuable improvements that were on the land, and had possession, and received rents and profits for a number of years.

These questions could only be settled in equity. "The mortgagor of land, as between himself and the mortgagee, has only and equitable title, and is not entitled to possession, and cannot sustain ejectment against the mortgagee.

Brobst vs Brock, 10th Wallace, 519.

Jones on Mortgages, Sec. 673, 674 and 702.

In the case of Moore vs Munn, et al., 69 Ill., page 591, the Court held that when a deed to land was *procured by fraud*, a Court in Chancery would remove it as cloud, even if the party was not in possession, and had a complete remedy at law by ejectment.

In the case at bar, when the original petition was filed by Turney in 1874, and when the amended petition was filed by Turney and Adams in 1876, the debt due the Slevens was not fully paid. The $800.00 afterwards paid to the Slevens by Rider was not paid until August 13th, 1877. Adams was not entitled to the possession of the land when these petitions were filed. The Slevens were then in possession, under their mortgage, and had a right to remain in possession until their debt was fully paid, and all their equities were adjusted. But Adams had a right to protect his equity of redemption, and to remove a cloud from the same. He had a right to require that the records of Wayne county, in which the land is situated, show the true condition of his title. He was the owner of the land subject to whatever amount might be due the Slevens under their mortgages, and he had a right to ask a Court of Equity to decree that fact, and

declare the true condition of his title. The scope and purpose of the petitions, filed by the Appellees in this case, go no farther than this. That the Circuit Court, on the hearing of this case, went further, and declared that whatever rights yet remained to the Slevens under their mortgages should not be impaired by the decree, but should be secured to them, even if it went beyond the scope of the issue as presented by the pleadings, was a decree and ruling in behalf of Appellants of which they cannot complain. If error it was, it was not error against Appellants, but was in their interest, and for their benefit. The Court considered the stipulation filed by both Complainants and Defendants (see page 12 printed record) as being sufficiently broad, to confer on the Court ample authority to adjust all the equities between the parties to this litigation, so far as it pertained to the subject matter in suit.

Appellants insist that it was error to hear evidence in the Circuit Court, on the part of Appellees, as no replication was filed by Appellees to Appellants' answer.

This case was not set down for hearing on bill and answer. The most that can be said is, that the case was heard on bill, answer and evidence without objection.

Where parties go to trial without a replication, and the case is heard on the evidence without objection, the Defendant will be considered as having waived the formality of a replication, and the answer will have no effect as evidence. See

Corbus vs Teed, 69 Ill., 209, and numerous authorities

therein cited.

In the case at bar the issue was made up in the state court, before the case was certified to the U. S. court. And by a provision of the Statute of Illinois, the answer under oath was waived; and in a case, where the oath of the Defendant is waived by Complainant's bill, and the answer is not under oath, the answer can in no event be taken as evidence, whether replication be filed or not. In such cases it is but a mere formal pleading.

Chambers vs Rowe, 36 Ill., 171.

Jameson vs Conway, 5 Gillman, 227.

Scott vs Clarkson, 1 Bibb, 277.

The want of a replication is not cause for reversing a decree on error, where parties take deposition, and submitted the case without objection.

Jameson vs Conway, *supra*.

It is insisted that the Circuit Court erred in dismissing the cross-bill, whereby Appellants were deprived of of the right of perfecting the record of the Court from which they claim to derive title; and the Statute of the State of Illinois is quoted, by attorney for Appellants, as giving Appellants a right under their cross-bill to perfect the records of the Circuit Court of Clinton county, Illinois, so as to establish decrees in said Clinton County Circuit Court. This Statute of Illinois is set out in full in Appellants' brief, page 19 and 20, and as will be seen on an inspection of the Statute it can have no application to this case. That Statute expressly provides that the proceedings to establish records must be in the Courts where

the records have been destroyed. Each and every section of that act declares, that the proceedings must be brought and prosecuted in the Court where the record has been destroyed. And it would be strange if it were otherwise. It would be in conflict with all our preconceived ideas of Courts of Law, if one Judicial Tribunal could make up a judgment or decree and order it to be spread of record as the judgment or decree of another Judicial Tribunal. The position of Appellants by invoking the benefit of this Statute is, that the Circuit Court of the United States, sitting in Springfield, Illinois, could enter a decree reforming or restoring the records of the Circuit Court of Clinton county, Illinois, and order the same to be spread of record, as the decrees of the Circuit Court of that county. The Statute is explicit, that each Court must restore its own records when destroyed. But in the case at bar, Appellants aver in their cross-bill under oath that there never were any such records of the foreclosures upon which Appellants' deeds are based. (See page 20 of printed record.)

In this Hon. Court the Appellants must be confined to the exceptions that were taken in the trial court. In the entire record sent up from the Circuit Court in this case, no objections or exceptions of any kind will be found in any part of the record, except the seven exceptions filed to the report of the Master on page 169 of printed record.

These exceptions are as follows, and refer entirely to the manner of stating the account:

First exception. For that the said master, in and by said report, found and reported to the Court that these exceptants were in the actual possession of the lands in the pleadings in this case described at some time or times, when it appears from the edvidence that these exceptants were never at any time in the actual occupancy or possession of said lands.

Second exception. For that the said master, in and by said report, finds and reports to the Court that these exceptants are liable for and chargeable with large sums of money for the rents and profits of the lands in the pleadings described which they might have received by the exercise of reasonable care and prudence.

Third exception. For that the said master, in and by the said report, has found and reported to the Court that these exceptants are liable for and chargeable with the natural decay of the improvements on said lands and the cutting and removal of timber upon and from the lands aforesaid as waste committed by these exceptants.

Fourth exception. For that the said master has found and reported to the Court in and by his said report that there is a balance due to the complainants in the original bill, the sum of seventy-seven dollars and fifty-eight cents.

Fifth exception. For that the said master, in and by his said report, has erroneously computed interest upon sums of money reported by him to have been received by these exceptants on account of rents of the lands in the pleadings described.

Sixth exception. For that the finding and conclu-

sions of the said master in the said report contained are unwarranted by the evidence in the cause.

Seventh exception. For that the conclusions and findings of the said master in the said report contained are unwarranted and are beyond the scope of the interlocutory order herein refering the said cause to him.

Wherefore the said defendants in the original bill herein and complainants in the said cross-bill do except to the said report of the said master in chancery and appeal therefrom to the judgment of this honorable court.

WILLIAM J. CONKLING AND
PALMERS, ROBINSON & SHUTT,
For the Exceptants Aforesaid.

In conclusion, we suggest that this Court will not reverse a judgment or decree for trival errors, that work no injustice to the party appealing.

Greenleafs Lease vs Booth, 5th Peters, 135.

Campbell vs Pratt 2d Peters, 354.

Brobst vs Brock, 10th Wallace, 519.

No injustice has been done Appellants by the decree of the Circuit Court appealed from; and in equity and justice every cent has been paid Appellants that was ever due them on all of the mortgages executed on the land by Turney.

The principal of the three mortgages was.....	$3237
The Slevens received from the sale of that portion of the land sold to Holmes and Rider and Barkley, (which sales Appellees confirmed)	2850
Leaving due as principal on all the notes the sum of	387

For this trivial sum, and the accrued interest on the notes, the Slevens used and occupied 360 acres of improved lands, all under fence, and all but 80 acres in cultivation, for thirteen or more years, and in addition to this, they sold, and removed from the land, timber and buildings and fencing, found by the master, to be of the value of $810.00.

Every equity in this case is with the Appellees.

What judgment or decree, more favorable to Appellants, could the Court render in the case?

Appellants could not recover the land in ejectment, if they were out of possession; nor defend against ejectment if they were in possession, as, by their own showing, they never had decrees of foreclosure to base their deeds upon.

They could not now go into equity and foreclose their mortgages for two reasons:

First. Their right to foreclose accrued in 1854, and the statute of limitation of sixteen years, has been a complete bar since 1870.

Second. In a proceeding to foreclose, the evidence would again show, as it was shown in this case, that the debt the mortgages were given to secure have been fully paid.

We therefore ask that the decree of the Circuit Court may be affirmed.

R. P. HANNA,
H. TOMPKINS,
Attys. for Appellees.